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THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS AND ITS MEMBER STATES

UNIVERSALITY OF HUMAN RIGHTS AND THE ROOM FOR
PARTICULARITIES

PROEFSCHRIFT

ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. E.H.L. Aarts, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op woensdag 19 december 2018 om 14.00 uur

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LIST OF ABBREVIATIONS

ACMW	ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AEC	ASEAN Economic Community
AHRB	ASEAN Human Rights Body
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIPA	ASEAN Inter-Parliamentary Assembly
AIPO	ASEAN Inter-Parliamentary Organisation
APSC	ASEAN Political-Security Community
ASA	Association of Southeast Asia
ASC	ASEAN Security Community
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
AUN	ASEAN University Network
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	International Convention for the Protection of all Persons from Enforced Disappearance
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHR	Commission on Human Rights of the Philippines
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DSM	Dispute Settlement Mechanisms
ECOSOC	UN Economic and Social Council
EPG	Eminent Persons Group on the ASEAN Charter
ESCAP	UN Economic and Social Commission for Asia and the Pacific
HLP	High-Level Panel
HLTF	High-Level Task Force for the Drafting of the ASEAN Charter
HPA	Hanoi Plan of Action
IAI	Initiative for ASEAN Integration
ICCPR	International Covenant on Civil and Political Rights

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
Komnas HAM	Komisi Nasional Hak Asasi Manusia
MAPHILINDO	Malaysia, the Philippines and Indonesia
MHRC	Myanmar Human Rights Commission
NHRCT	National Human Rights Commission of Thailand
NHRI	National Human Rights Institutions
OHCHR	Office of the High Commissioner for Human Rights
SEATO	Southeast Treaty Organization
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia
TAC	Treaty of Amity and Cooperation in Southeast Asia
ToR	Terms of Reference
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNECAFE	United Nations Economic Commission for Asia and the Far East
UPR	Universal Periodic Review
VAP	Vientiane Action Programme
VDPA	Vienna Declaration and Programme of Action
ZOPFAN	Zone of Peace, Freedom, and Neutrality

CHAPTER I

INTRODUCTION

“On this Human Rights Day, it is my hope that we will all act on our collective responsibility to uphold the rights enshrined in the Universal Declaration. We can only honour the towering vision of that inspiring document when its principles are fully applied everywhere, for everyone.”

Former UN Secretary-General Ban Ki-Moon¹

1 INTRODUCTION TO ASEAN’S REGIONAL HUMAN RIGHTS ENGAGEMENT

Whereas former United Nations (UN) Secretary-General Ban Ki-Moon underscores the importance of the universality of human rights in his statement, he also knows the reality; the universal application of human rights remains an aspiration to achieve. Moreover, there are different interpretations of what the concept of universality entails. In addition, the claim of the universality of human rights is being debated from different angles, both in literature and by and among different States.

In Southeast Asia, some States have made a plea for cultural relativism in their so-called ‘Asian values’ debate. Although the arguments were brought forward by a small number of States, most notably by Singapore and Malaysia, these States proposed a certain particularity that would supposedly be commonly shared by Asian States. According to its proponents, these characteristics were decisive in the interpretation of human rights standards in Asia and would lead to an ‘Asian view’ of human rights.

The Asian values argument reached its peak in the early 1990s, whereby the call for relativism, including cultural relativism, also penetrated the international level. Significant in this respect is the 1993 Bangkok Declaration, which was formulated in the run up to the 1993 World Conference on Human Rights (Vienna, 14-25 June 1993). Room for particularity was included in the subsequent 1993 Vienna Declaration and Programme of Action, albeit that the concept of the universality of human rights remained the starting point.

¹ Ki-Moon Ban, ‘Secretary-General Message on Human Rights Day’ (New York, 10 December 2008), available at <<https://www.un.org/sg/en/content/sg/statement/2008-12-10/secretary-general-message-human-rights-day>> last visited on 18 July 2018.

These factors contributed to the general image that the Association of Southeast Asian Nations (ASEAN) and its individual Member States were opposing the concept of the universality of human rights, or were at least pursuing their own view. However, it should be borne in mind who was making the argument for this relativistic attitude. Caution is also needed due to the risk of overgeneralising and overstating the argument. While some governments adopted the Asian values argument, other Southeast Asian States such as Indonesia and the Philippines did not. Others, for example South Korea's former president Kim Dae Jung, explicitly criticised it. In addition, the Bangkok Declaration that was drafted by NGOs argued in favour of the universality of human rights. While explicit reference to the Asian values argument by its proponents seems to have faded away with the Asian financial crisis of 1997-98, scholars vary in their analysis in what is left of the Asian values debate.

While the Asian values debate faded into the background, the development of human rights in the ASEAN region, similarly to other regions, continued to be influenced by the region's own characteristics or particularities. Due to the previous experience with the Asian values argument, these particularities have often been presumed to be detrimental to universal human rights standards. However, a lowering of these standards is not necessarily the case. Hence, ASEAN could possibly offer an enrichment to these human rights standards. Moreover, ASEAN and its Member States increasingly refer to human rights standards set by the United Nations and undertake various initiatives in the field of human rights cooperation. For instance, ASEAN Member States have become parties to the core human rights treaties of the United Nations. At ASEAN level, human rights cooperation was intensified and institutionalised from 2007 onwards. This led to the establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR) as the organisation's overarching human rights body and the adoption of the ASEAN Human Rights Declaration (AHRD).

While developing an ASEAN human rights system, ASEAN and its Member States acknowledged that human rights are universal, indivisible, interdependent and interrelated. At the same time, reference is also made to national and regional particularities and various cultural and historical backgrounds. From this follows the ambition of ASEAN and its individual Member States to connect to universally recognised human rights, while also including their own particularities.

Whereas Africa, the Americas and Europe have all developed their own human rights system, Asia lags behind. Argued from the claim to the universality of human rights, the development of ASEAN's human rights system could diminish this geographical lacuna.

2 RESEARCH FOCUS AND RESEARCH QUESTION

ASEAN is, like any regional or sub-regional organisation, influenced by regional and national particularities. Within ASEAN, this is especially the case due to the so-

called ASEAN Way, the organisation's *modus operandi*, the generality in which human rights are formulated in the ASEAN Human Rights Declaration and due to the limited mandate of ASEAN's human rights mechanisms. While ASEAN is the common denominator of its Member States, the ten Member States form the background and basis for regional cooperation in the field of human rights. The organisation's institutionalisation of Member State cooperation, as well as the legal and political context within ASEAN and its Member States are factors that determine ASEAN's current human rights system.

The claim to the universality of human rights does not preclude such influences, as long as these particularities do not bring about a system that is substandard to internationally recognised human rights standards. Salient for the ASEAN region is that it has been criticised for regressing in terms of human rights standards and that ASEAN's Human Rights Declaration and human rights mechanisms are flawed.

The focal point of this research is how ASEAN and its Member States contribute to and undermine the claim to the universality of human rights. As the current literature on human rights in ASEAN is relatively modest and is at times out-dated or too general in nature, the present research provides a more nuanced and up-to-date picture of particular attitudes that exist within the ASEAN context. The research adopts a normative-legal approach, unveiling how the law on paper relates to the claim to the universality of human rights. To this end, the following main research question has been formulated:

(How) does the development of a human rights system in the ASEAN context build upon and/or detract from the claim to the universality of human rights?

The research focuses both on the substance and the procedural aspects within the organisation and its Member States. The point of substance concerns the room for developing human rights standards based on the context of ASEAN and its Member States. Therefore, the ASEAN Human Rights Declaration forms the subject of scrutiny in this research. The declarations and reservations to the core UN human rights instruments to which the ASEAN Member States are party and the fundamental rights in their constitutions reveal the positions of these States towards human rights and are, therefore, also included.

The procedural aspect focuses on the mechanisms that are used for the promotion and protection of human rights, whereby the ASEAN Way is a decisive factor in the ability to make any progress at ASEAN level. At the regional level, the mandates of the ASEAN Intergovernmental Commission on Human Rights, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) will be researched. At the level of ASEAN's Member States, a choice has been made to analyse the mandate of the National Human Rights Institutions (NHRIs) because they can be considered as the national counterparts of

ASEAN's human rights mechanisms. In this way, the similarities and differences between the regional and national level can be discerned.

Jack Donnelly's idea of 'relative universality' and his three-tiered scheme of 'concepts', 'conceptions' and 'implementation' are used as a theoretical framework for this study. This will be dealt with in greater detail in Chapter II, but in his view concepts are "an abstract, general statement of an orienting value",² while conceptions are concerned with the interpretation of these concepts. The level of implementation is concerned with the implementation of these interpretations in law and practice.

Donnelly regularly argues for universality in its most absolute form at the level of concepts, whereby more room for variation exists at the other two levels as long as this variation is consistent with the overarching concept.³ His notion of relative universality involves the idea that human rights are relative to various factors (such as culture, economic development and time), while the universality of human rights remains the starting point. Legitimate particularities can thus only play a subsidiary role.

In this research an adaption is made to Donnelly's scheme in order to be able to fully analyse the normative and procedural aspects of both the human rights system of ASEAN and the multiple human rights approaches of its individual Member States. For this analysis, an explicit reference to norms of *ius cogens*, the feasibility of human rights curtailments based on international human rights law and the procedural implementation of human rights are included. These adaptations lead to the following framework and research approach:

1. Concepts: Which human rights are included in ASEAN's human rights system (including norms of *ius cogens*)? The focal points of this analysis are the ASEAN Human Rights Declaration and the constitutions of the ASEAN Member States.
2. Conceptions: Interpretations and restrictions of human rights in ASEAN and their conformity to international human rights law. The focus lies on the declarations and reservations presented at the moment of ratification of or accession to UN core human rights instruments and on fundamental rights in the Member States' constitutions.
3. Implementation: The way in which human rights are legally protected and promoted in ASEAN's human rights mechanisms. The focus here lies on the ASEAN Way and the ASEAN Intergovernmental Commission on Human Rights.

² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 94. In later work, he argued that functional and overlapping consensus universality lie primarily at this level; Jack Donnelly, 'The Relative Universality of Human Rights' (2007), 29 *Human Rights Quarterly* 281, p. 299.

³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 103.

In order to answer the main research question, the following sub-questions have been formulated:

1. How did human rights develop in international law and what does the claim to the universality of human rights entail? (Chapter II)
2. How do the individual ASEAN Member States interpret human rights today? (Chapter III)
3. How does ASEAN develop as a regional organisation and what are the consequences thereof, seen from a human rights perspective? (Chapter IV)
4. What is ASEAN's course in developing its human rights system and to what human rights approach have led these developments today? (Chapter V)

By answering these questions, this research provides a detailed legal analysis of human rights in the ASEAN context at a conceptual level and of the mechanisms installed to protect and promote these rights. The research provides a nuanced insight in the (room for) particularities in ASEAN. When speaking of particularities that exist in the ASEAN region, one should bear in mind that there is, naturally, no fixed Southeast Asian context in which human rights protection and promotion takes place. Nevertheless, this research shows that specific interpretations by the ASEAN Member States have implications for human rights in ASEAN and the claim to the universality of human rights. By taking the claim of the universality of human rights as a starting point, the research reveals the way in which the ASEAN region detracts from and builds upon the notion of the universality of human rights at a conceptual and procedural level.

This being said, the current situation is that the ASEAN region continues to face severe human rights abuses. Recent examples are the humanitarian crisis of the Rohingya in Myanmar, Duterte's war on drugs and extrajudicial killings in the Philippines, and the political instability and curtailment of human rights and liberties by the military junta in Thailand. The actual compliance with human rights norms falls outside the scope of the research. Nevertheless, this research is also relevant for 'the law in practice'. It is essential to understand the instruments and mechanisms, as well as their limitations, in order to get the most out of this system when addressing human rights violations.

3 STRUCTURE OF THE THESIS

Chapter II focuses on human rights from a theoretical perspective, which forms the framework for the present research. More specifically, this chapter discusses the notions of the universality of human rights, universalism and relativism, with a focus on Southeast Asia. Topics of research include the development and nature of human rights (including the universality of such rights), the norms of *ius cogens*, the Universal Declaration of Human Rights (UDHR) and the 1993 Vienna

Conference. The research describes different perceptions of what ‘universality’ encompasses. In addition, while relativistic attitudes are often perceived to be hostile to the claim to the universality of human rights, this chapter shows that this notion leaves room for national and regional particularities. Donnelly’s theory of ‘concepts’, ‘conceptions’ and ‘implementation’ is explained and provides the basis for the theoretical framework of the present study. While building upon Donnelly’s framework, both substantive aspects (*i.e.* legal instruments which lay down the norms and standards) and procedural issues (*i.e.* mechanisms that protect and promote these norms and standards) will be addressed.

Chapter III analyses the formal recognition of human rights in the individual ASEAN Member States and the mandates of the National Human Rights Institutions to protect and promote human rights. In ASEAN as an organisation, the principles of consensus, non-confrontation and the stress on State sovereignty are key. ASEAN’s current human rights system has a generally formulated human rights declaration, no court to interpret these rights and human rights bodies that mainly focus on the promotion of human rights. Consequently, ASEAN’s human rights system relies greatly on the interpretation of human rights by the individual Member States and their common ground. An analysis of the constitutions, declarations and reservations to core UN human rights instruments by the ASEAN Member States, as well as the mandate of the National Human Rights Institutions, are therefore relevant. This can also assist in explaining the consensus reached at ASEAN level and give insight in the possibilities in and boundaries of the development of ASEAN’s human rights system. It also nuances the general picture that Southeast Asian particularities are essentially detrimental to human rights and uncovers which ASEAN Member States are in line with or build upon the claim to the universality of human rights with respect to their formal recognition of human rights, and which Member States are detracting from it. In this way, the analysis offers a concretisation of the framework of ‘concepts’, ‘conceptions’ and ‘implementation’ at the level of the ASEAN Member States.

Chapters IV and V focus on the ASEAN level. In particular, Chapter IV scrutinises ASEAN as an organisation from a historical perspective, which includes its establishment and integration. It provides a brief analysis of ASEAN’s key documents and scrutinises the so-called ‘ASEAN Way’, which captures the organisation’s key values of its way of cooperation. This leads to a better understanding of ASEAN’s integration and the context in which its human rights system is still evolving and could evolve in the future. In this way, the context for the aspect of ‘implementation’ as part of the framework used in this study is provided.

Chapter V focuses on ASEAN’s human rights protection and promotion by analysing ASEAN’s key human rights (oriented) documents. The focus of this part of the research lies on universalism and particularities, as well as past and current developments in the field of human rights mechanisms. Specifically, the development of ASEAN’s own regional human rights system, in which the stress

on particularities is merged with human rights standards formulated at UN level, is scrutinised. The mandates of ASEAN's human rights mechanisms are also analysed. In this way, the framework of 'concepts', 'conceptions' and 'implementation' is further tailored to the ASEAN level.

Chapter VI responds to the main research question of the thesis, and is divided into three separate sections applying and questioning Donnelly's model of 'concepts', 'conceptions' and 'implementation'.

4 METHODOLOGY

This research focuses on human rights at a conceptual level and as endorsed on paper, as well as the procedural aspects of ASEAN's human rights system. By researching the norms and mechanisms to protect and promote these norms, the whole structure of ASEAN's human rights system will be addressed. To this end, literature research is conducted and the arguments of the Member States are scrutinised.

This analysis respects key characteristics of international human rights law, such as the fact that some norms have a *ius cogens* character; at the same time, the research also recognises the position of the State in general international law, namely 'consent to be bound' as a starting point. In performing this analysis, the stance and activities of ASEAN and its Member States in the field of human rights are researched. A modest reference is made to the attitude of actors of 'Track II' as these viewpoints contribute to attaining a more comprehensive picture of the regional context. Track II is described as "unofficial activities, involving academics, think tank researchers, journalists and former officials, as well as current officials participating in their private capacities".⁴

The procedural part of the research question focuses on ASEAN's regionalism and human rights engagement by also conducting literature research. ASEAN's existing mechanisms and the initiatives taken by the National Human Rights Institutions existing in the region have been included. ASEAN has always underscored that its integration process and the outcome thereof, including human rights related issues, should correspond to the region's context. As this research also focuses on the mechanisms that are already in place at the national level, the research uncovers similarities and differences between the regional and national level that could lead to possible lessons for ASEAN's human rights system.

Field research was scheduled in the early stages of the research in order to gain insight on where ASEAN and its Member States stood with respect to their human rights engagement. From the preliminary desk research followed that relevant factors in the development of an ASEAN human rights system seemed to revolve around the notion of the universality of human rights, universalism, relativism and the particularities of the ASEAN region. The field research therefore dealt with

⁴ Desmond Ball, Anthony Milner and Brendan Taylor, 'Track 2 Security Dialogue in the Asia Pacific: Reflections and Future Directions' (2006) 2 *Asian Security* 174, p. 175.

these elements, hereby focussing on the extent that relativist attitudes were present in the region, and in the country of the interviewee in particular, and the implications of these factors for a regional human rights system.

For the purposes of the research, six ASEAN Member States were visited in the period from 1 September 2009 until 1 February 2010: Cambodia, Malaysia, Indonesia, the Philippines, Singapore and Thailand. ASEAN Member States Brunei Darussalam, Laos, Myanmar and Vietnam were omitted. The choice was based on the presence of key actors in the regional human rights debate. Many of the regional human rights developments were initiated and supported by research institutes and NGOs, primarily active in the six States concerned. Practical issues were also part of the selection, such as the number of contacts in each Member State and the timeframe in which the field research took place. A selection of respondents was made in every State; the selection included key NGOs, universities, research institutes, the then four National Human Rights Institutions, a ministry and the ASEAN Secretariat. The organisations were selected according to their expertise and objectivity, and thus the likelihood of acquiring accurate information, as far as this could be estimated beforehand.

The fieldwork included 41 semi-structured interviews. The interviewees worked at 25 different organisations.⁵ The questions were formulated in a broad manner (*i.e.* a semi-structured interview format) in order to allow for space to discuss the topics according to the expertise of the interviewee and to leave room for the interviewee to add additional relevant points for discussion. Aspects of this research were discussed during a short additional field trip to Jakarta and Surabaya in July 2012.⁶ At any early stage in the research, the interviews served to sharpen the research focus, whilst in later years the reports of the organisations the interviewees work for were able to be used to track possible changes in their thinking.

⁵ Bangkok: Chulalongkorn University, Forum Asia, NHRI of Thailand and People's Empowerment Foundation. Jakarta: ASEAN Secretariat, Demos, ELSAM, Human Rights Working Group and Ministry of Law and Human Rights, Surabaya: Airlangga University, Komisi HAM LPPM and PUSHAM (Universitas Surabaya). Manila: Ateneo Human Rights Center, Working Group for an ASEAN Human Rights Mechanism (Ateneo de Manila University) and NHRI of the Philippines. Kuala Lumpur: Malaysian Bar Council, National University of Malaysia, SUHAKAM and University of Malaya. Singapore: ISEAS, NUS. Phnom Penh: CLEC, KID Action Committee, LICADHO and an organisation that preferred to stay anonymous. The research was conducted from September 2009 until February 2010.

⁶ Jakarta: Human Rights Working Group, ASEAN Resource Centre for Human Rights (Universitas Indonesia) and Airlangga University.

CHAPTER II

THEORETICAL HUMAN RIGHTS FRAMEWORK

1 INTRODUCTION

The protection and institutionalisation of human rights at the international level is relatively recent. Nevertheless, it is argued that the evolution of international human rights law has a centuries old background; religions such as Hinduism, Islam,¹ Judaism, Buddhism, Confucianism and Christianity express ideals on human life, human dignity and the responsibility a person has towards others.² In line with the observation of Malcolm N. Shaw, rights can indeed be deduced from various sources, whether religion, the nature of man or the nature of society.³

This chapter starts with a brief introduction to the development of human rights concepts, as far as relevant for the subject matter of the research. The development of human rights at the national level is also described in brief, as this was the first step before human rights were acknowledged at the international level. An excursion into the history and evolution of human rights is relevant, as the historical origin of human rights was one of the foundations on which a number of Asian – as well as other non-Western – States based their critique on human rights. Specifically, this chapter shows the historical particularity, or the Western origin, of human rights and the implications for the acceptance of human rights by non-Western States.

¹ Abdullahi An-Na'im is one of the leading scholars on Islam and human rights, see for a selection of his work Abdullahi An-Na'im, *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*, edited by Mashood A. Baderin (Collected Essays in Law, Routledge, Abingdon 2016).

² For examples of different religious traditions see Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Pennsylvania Studies in Human Rights, 2nd edn, University of Pennsylvania Press, Philadelphia 2003), pp. 5-8. The author contended that there are three key contributions to the evolution of international human rights by these religions: "They established visions of timeless ideals and normative standards about the dignity of all human beings (...). Second, by seeking to develop a moral imperative or universal sense of obligation toward all, these religious traditions helped establish an ingredient essential to any and all international human rights: a concept of responsibility toward common humankind. (...) Third, developing concepts of duties, these religious traditions provided an inherent beginning for discussions about rights"; *ibid*, p. 9.

³ Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge 2008), p. 266.

There is a disagreement as to the nature of human rights, or in other words, whether human rights are universal. Cultural relativists challenge the claim to the universality of human rights. In Southeast Asia, this reached its peak in the Asian values debate during the time of the Asian economic miracle in the early 1990s, but the universalist-relativist debate has also occurred on later occasions. Allowing room for particularities does not preclude the universal character of human rights. In addition, there are different perceptions of what the notion of the universality of human rights entails. These variations are analysed in more detail in this chapter.

As the development of human rights is elaborately discussed in other literature,⁴ this chapter will only briefly describe this topic in order to understand the framework in which human rights developed. The focus is then shifted to the different interpretations of the universality of human rights, universalism and relativism and the discussion at the international level by focussing on the 1993 World Conference on Human Rights.

2 THE DEVELOPMENT OF HUMAN RIGHTS LAW IN SHORT

While the roots of human rights can be found in different societies, it was especially in Europe and the United States where the platform for human rights developed. Human rights were for example already debated in the early Spanish school of international law in the 16th century. During the Enlightenment, John Locke amongst others paved the way for the understanding and development of fundamental rights that the individual could exercise against illegitimate requests of the State.⁵ In the following passage he made clear that it is possible for individuals to uphold natural freedoms against the State:

Nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man (...) cannot subject himself to the arbitrary power of another (...).⁶

The contextualisation of human rights was already discussed during the time of Enlightenment humanism, which considered that human rights must be placed within a context, as this is a precondition of understanding.⁷ Based on this perception, some authors argued that it is not only worthless to proclaim universal human rights, but also dangerous as it is not based in an historical and cultural

⁴ See for example Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (United Nations Intellectual History Project Series, Indiana University Press, Bloomington 2008).

⁵ Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Pennsylvania Studies in Human Rights, 2nd edn, University of Pennsylvania Press, Philadelphia 2003), p. 11.

⁶ From John Locke's 'Two treatises of civil government', see Christian Tomuschat, *Human Rights. Between Idealism and Realism* (2nd edn, Oxford University Press, Oxford 2008), p. 12.

⁷ Mark Tebbit, *Philosophy of Law. An Introduction* (2nd edn, Routledge, Abingdon 2005), p. 143.

context.⁸ Social conditions are thus necessary to take into account; it is not possible to “rise above history and impose moral truths upon society from a universalistic standpoint outside of it”.⁹ This school assumed that laws and rights develop from local custom, which is rooted in social and legal culture.¹⁰ It was therefore argued that imposing human rights on other societies without this rooting would consequently fail. Within idealism, in Hegelian language, the sensitivity for the context can be described with the notion that “rights may well be rational “ideas”, but their enactment “stands in the world”, and, as such, “calls for situated judgment regarding justice and equity”.¹¹

In the centuries that followed, declarations and treaties were adopted which referred to human rights.¹² It must be borne in mind that human rights law was initially not inclusive in the sense that human rights were to be enjoyed by all. Additionally, human rights at the international level initially only dealt with topics in the field of humanitarian law. Human rights were also often considered to be an internal matter, only protected by the national States and not allowing room for transnational protective mechanisms.¹³ Nevertheless, human rights became accepted as indispensable to a constitutional order at the national level and, as time passed, attention became also step after step visible at the international level.

The development of human rights protection at the international level got an impetus after the First World War. This war made it clear that abuse of powers could still occur in countries that considered themselves civilised and enlightened. Consequently, the League of Nations was established. This organisation had the aim of promoting international cooperation and achieving international peace and justice.¹⁴ The Covenant of the League of Nations only referred to human rights in a limited way; some rights of people and mandated territories as well as obligations of mandatories were addressed,¹⁵ as it was generally known that inhabitants of colonies were not treated fairly. Within this organisation, the first international control system emerged from practice, albeit that the procedure was defective. The

⁸ Mark Tebbit, *Philosophy of Law. An Introduction* (2nd edn, Routledge, Abingdon 2005), p. 143.

⁹ Mark Tebbit, *Philosophy of Law. An Introduction* (2nd edn, Routledge, Abingdon 2005), p. 143.

¹⁰ Mark Tebbit, *Philosophy of Law. An Introduction* (2nd edn, Routledge, Abingdon 2005), p. 143.

¹¹ Fred Dallmayr, “‘Asian Values’ and Global Human Rights” (2002) 52 *Philosophy East and West* 173, p. 174.

¹² Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, London 1997), p. 209. For example, the Virginia Declaration of Rights (1776), the American Declaration of Independence and the French Déclaration des Droits de l'Homme et du Citoyen (1789). In the field of humanitarian law, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864) and the instruments adopted by the Hague Peace Conferences of 1899 and 1907 are important.

¹³ Christian Tomuschat, *Human Rights. Between Idealism and Realism* (2nd edn, Oxford University Press, Oxford 2008), p. 16.

¹⁴ Covenant of the League of Nations, preamble <http://avalon.law.yale.edu/20th_century/leagcov.asp> last accessed 5 September 2018.

¹⁵ See Article 22(4) and (5) and 23(a) of the Covenant of the League of Nations, <http://avalon.law.yale.edu/20th_century/leagcov.asp> last accessed 5 September 2018.

possibility of making petitions made it possible that individuals could play an active role before an international body.

A stronger recognition for the position of the individual came after the Second World War; in contrast to the former conception that individuals are only the object of international regulations adopted by States,¹⁶ their status was improved as individuals acquired more rights. This conclusion can for example be drawn from the codification of human rights in numerous international treaties and their complaint procedures. This codification acknowledged that human rights are considered to be “fundamental and inalienable rights essential to the human being”.¹⁷ This conception, amongst others rooted in Roosevelt’s four freedoms,¹⁸ accentuated that human rights in many ways do not belong to the exclusive jurisdiction of a home State anymore, which was a harsh lesson learned from the atrocities that happened during the war.¹⁹

Nowadays, human rights are regularly protected and promoted at three levels. The first level is the inclusion of human rights at the domestic level as fundamental rights. The second level is the regional and sub-regional level among Member States belonging to a specific regional or sub-regional intergovernmental or supranational organisation, and the third is the international level among the Member States of the United Nations, or what is also described as the universal level.²⁰ These three levels influence each other in terms of interpretation and application, making human rights law a dynamic part of international law. Olivier De Schutter noted in this respect:

For although human rights have escaped the confines of the territory of domestic constitutions, they have not dissolved fully into international law and in fact, they resist assimilation. International human rights courts are under the permanent temptation to mutate into constitutional courts. The domestic judge in turn tends to aggrandize his or her power in the name of bringing home values that are universal and rules that are supranational – but, by invoking international law, the domestic judge also transforms it into something else, that is better suited to the regulation of the relationships between the State and the individual or between individuals, than to the relationships among States.²¹

¹⁶ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, London 1997), p. 31.

¹⁷ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, London 1997), p. 209.

¹⁸ *I.e.*, freedom of speech and expression, freedom of religion, freedom from economic want, and freedom from fear and aggression.

¹⁹ Christian Tomuschat, *Human Rights. Between Idealism and Realism* (2nd edn, Oxford University Press, Oxford 2008), p. 22.

²⁰ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 12.

²¹ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 1.

The initial development of human right concepts can be regarded as a response to social challenges in Western States. This does not inform, however, as Jack Donnelly rightfully noted, anything about their applicability, relevance, appropriateness or value inside or outside the West,²² although generally speaking, the West has an “individualist view of human rights”.²³

The idea that human rights are borne by individuals was initially a Western notion. Nevertheless, this concept is not alien to other cultures, nor does it mean that Western cultures and societies have been pro-human rights.²⁴ In fact, Donnelly stated that even though human rights notions were first developed in the West, this was not because of specific features of Western culture. Instead, he noted that “what we think of today as Western culture is largely a result, not a cause, of human rights ideas and practices”.²⁵ He furthermore observed that “[n]o particular culture or comprehensive doctrine is by nature either compatible or incompatible with human rights”,²⁶ whereas Chris Brown noted that “many cultures and civilizations have developed ideas about the intrinsic worth and dignity of human beings”.²⁷

Nonetheless, although the intrinsic character of human rights matches societies across the world, the current international human rights regime is sometimes considered to be a Western construct, especially if it comes to civil and political rights. Due to the fact that power politics is dominated by the West coupled with the history of Western imperialism and colonialism, non-Western governments are at times reluctant, to say the least, to adopt the Western influenced international human rights regime which they regard as a tool of Western powers to interfere with the affairs of other States and as a new form of (cultural) imperialism.²⁸ This

²² Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 69.

²³ Paul Close and David Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (The International Political Economy of New Regionalism Series, Aldershot, Ashgate 2004), p. 25.

²⁴ Zehra F. Kabasakal Arat, ‘Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights’ in José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p. 391.

²⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 107.

²⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 107.

²⁷ Paul Close and David Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (The International Political Economy of New Regionalism Series, Aldershot, Ashgate 2004), p. 26 quoting Chris Brown, ‘Human Rights’ in John Baylis and Steve Smith (eds), *The Globalisation of World Politics* (2nd edn, Oxford, Oxford University Press 2001), pp. 599-600.

²⁸ Paul Close and David Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (The International Political Economy of New Regionalism Series, Aldershot, Ashgate 2004), pp. 19-20 and Zehra F. Kabasakal Arat, ‘Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights’ in José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p. 391.

can, however, be nuanced by examining the status of human rights instruments of the United Nations.

With the formulation of the Charter of the United Nations, the conviction came that the protection and promotion should not longer be regarded as an internal matter, but also an international one.²⁹ Furthermore, the UDHR was an important step forward. This document was initially endorsed by the then existing Asian States; furthermore, on several occasions they and other Asian states also did the same, for instance at the 1993 World Conference of Human Rights. While the acceptance of the UDHR and the ratification of human rights conventions were at times highly politicised, the subsequent reference to these documents in the years after implies that non-Western States have also accepted the substance of human rights, at least to a certain extent, as will be demonstrated in Chapter III.

The Western origin has thus become less relevant. Important, instead, is the interpretation of the broadly formulated human rights and its way of implementation. It is especially at these levels, on which differences can occur. Before this is explained in Section 3.2 of this chapter, the concept of ‘universality’ will first be explained.

3 THE CONCEPT OF THE UNIVERSALITY OF HUMAN RIGHTS

3.1 Terminology, aspects and possible forms of universality

From the previous section it can be understood that the universalistic claim of human rights caused problems, since the drafting of human rights law originated from Western thinking with little involvement of other regions throughout the world. Eva Brems captured this in the following observation:

Representatives of several non-Western societies hold a critical human rights discourse. They complain that human rights are oriented too much to the West and that as a result they do not sufficiently reflect the needs, concerns, and values of other parts of the world. The West and the international human rights community have generally perceived this criticism of international human rights based on the contextual particularities of non-Western societies as an attack on human rights, and in particular as a threat to the fundamental principle of the universality of human rights.³⁰

Clarification is needed on the meaning of the term ‘universality’ when researching the universality of human rights. Brems noted in this respect that the term ‘universality’ has different meanings. She uncovered 16 reoccurring concepts of universality in her literature research, that is to say: all-inclusiveness, formal

²⁹ Christian Tomuschat, *Human Rights. Between Idealism and Realism* (2nd edn, Oxford University Press, Oxford 2008), p. 22.

³⁰ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 2.

acceptance, historical origin, formal origin-norm creation, anthropological or philosophical acceptance, functional acceptance, multicultural composition of human rights, world-wide observance of human rights, general opposability of human rights, human rights as a legitimate concern of the international community, absence of double standards, priority of human rights, indivisibility of human rights, uniformity of standards, universality in time, and universality as a process.

These concepts are described below in order to obtain a better understanding of this diversity. Although Brems' research dates from 2001, it captures well the diverse concepts of universality. Her observations that the list is non-exhaustive because "the list of variations in meaning is as endless as that of human rights authors" and that it is "inevitably a simplification of reality"³¹ is borne in mind.

The following concepts are elucidated by Brems, which are complemented by Donnelly's notions of universality³² whose extensive research on the universality and relativity of human rights can be considered as a major contribution to the body of knowledge on this topic. His three-level scheme,³³ which follows from his ideas on universality, is used in the present research.

Universality interpreted as *all-inclusiveness* is a normative concept and corresponds to Donnelly's idea of 'conceptual universality' when he stated that human rights are rights one has because one is human. This implies that these rights are equal and inalienable because we either are or are not all human, which must be distinguished from what Donnelly calls 'substantive universality', or "the universality of a particular conception or list of human rights".³⁴ While inclusiveness says something about the idea that these rights are held by all, the enjoyment of these rights is relative as the enjoyment is dependent from where one is born or lives.³⁵ Theo van Boven dealt with inclusiveness as opposed to exclusiveness when he distinguished three different dimensions of universality.³⁶

³¹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 2.

³² Donnelly distinguishes conceptual, functional, legal international, overlapping consensus, anthropological, and ontological universality in his article on the relative universality of human rights, see Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281. He defends conceptual, functional, legal international, and overlapping consensus universality. He argues, however, that "anthropological and ontological universality are empirically, philosophically, or politically indefensible", see p. 281.

³³ This three-tiered scheme is explicated at multiple occasions, see Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, Jack Donnelly, 'Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)' (2008) 30 *Human Rights Quarterly* 194, and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013).

³⁴ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, p. 282.

³⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 99.

³⁶ Theo van Boven, 'Inleiding' in Cees Flinterman and Theo van Boven (eds), *Universaliteit van Mensenrechten: Fundamenteel en Controversieel* (Stichting NJCM Boekerij, Leiden 1992) pp. 3-5.

He observed amongst others that human rights have developed from rights for certain people in certain Nations (exclusiveness) towards the notion that human rights must be equally upheld for everyone (inclusiveness).³⁷

These authors pointed out that this notion of universality is common in literature and is included in the UDHR, which is “a common standard of achievement for all peoples and all nations”.³⁸ This viewpoint is also described as the ‘natural doctrine’ as part of the ‘foundationalist doctrine’: because of the unique foundation (*i.e.* human species), human rights are universal.³⁹ Other authors have clarified that alongside the notion that human rights are intrinsic to being human, it is imperative to combine this with the idea that one has the rights in virtue of “inhabiting a social world that is subject to the conditions of modernity”.⁴⁰ From this latter line of reasoning follows that universality in time does not exist.

Universality in terms of *formal acceptance* deals with the formal acceptance of international human rights instruments, such as declarations and resolutions. In line with the observation of Brems, it should be noted that the universality could be problematic in case universality is dependent on the formal acceptance of a State. When addressing this concept of universality, authors are however of the opinion that “the non-participation of a few states in the international human rights system cannot detract from the formal universality of human rights”.⁴¹ In addition, Cees Flinterman observed that the States Parties to human rights instruments are not only restricted to Western States, but spread across the entire world.⁴²

The Dutch Advisory Council on International Affairs considered the ratification of international human rights conventions by large numbers of States as an affirmation of the universality of human rights.⁴³ Donnelly speaks of ‘international legal universality’, which entails a “widespread active endorsement of

³⁷ However, the aim of making human rights accessible and ensuring them for all people around the world is not achieved. The Millennium Development Goals amongst others affirm this. Furthermore, the debate is going on as to how to improve the rights for indigenous people. In this sense, the universality as world-wide observance of human rights has not been reached.

³⁸ UN General Assembly Resolution 217 (III) (*Universal Declaration of Human Rights*), UN Doc. A/Res/217, 10 December 1948, preamble.

³⁹ Miodrag A. Jovanovic, ‘Human Rights - Universality and Context-Sensitive Implementation’ in Bojan Spaić and Kenneth Einar Himma (eds), *Fundamental Rights: Justification and Implementation* (Democracy and the Role of Law, Eleven Publishers International, The Hague, Forthcoming), p. 2. Available at <SSRN: <https://ssrn.com/abstract=2641275>> accessed 8 September 2018.

⁴⁰ John Tasioulas, ‘The Moral Reality of Human Rights’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University Press, Oxford 2007), pp. 76-77.

⁴¹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 6.

⁴² Cees Flinterman, ‘De Universaliteit van Mensenrechten’ in Cees Flinterman and Theo van Boven (eds), *Universaliteit van Mensenrechten: Fundamenteel en Controversieel* (Stichting NJCM Boekerij, Leiden 1992), p. 70.

⁴³ Advisory Council on International Affairs, ‘Universality of Human Rights: Principles, Practice and Prospects’, No. 63, November 2008, p. 13.

internationally recognized human rights”.⁴⁴ In other words, despite the cultural, political, regional, and economic diversity in the contemporary world, there is a near universal agreement on not only the existence but also the substance of internationally recognized human rights”.⁴⁵ According to Donnelly, “[i]nternational legal universality is one of the great achievements of the international human rights movement, both intrinsically and because it has facilitated a deepening overlapping consensus”.⁴⁶

Donnelly added that international legal universality is relative in the sense that it holds across the universe of States and in a particular time, whereby in the past it did not and in the future might not have such a widespread endorsement as it does today. In connection to Brems’ observation, Donnelly noted that this universality is incomplete as some States continue to resist international human rights norms.⁴⁷ In addition, he aptly observed that this type of universality is bounded, in the sense that while States agree that they have obligations, significant international enforcement mechanisms are lacking. This is related to Donnelly’s relativity of enjoyment. Nevertheless, he argued that this universality has immense significance, especially since States “are the most important in determining whether people enjoy the human rights that they have”.⁴⁸

When relating universality with *historical origin*, Brems noted that one cannot conclude that human rights are universal in this sense as historically speaking, “human rights are in the first place a Western creation”.⁴⁹ Donnelly observed in this regard that “Islamic, Confucian, and African societies did not in fact develop significant bodies of human rights ideas or practices prior to the twentieth century”.⁵⁰

Universality related to *formal origin-norm creation* is a combination of formal universality and historical universality and focuses on the participation in the historical drafting of a human rights text. Brems noted that this concept is used in the argumentation whether the UDHR is universal because of the participation of the five continents, or is not universal because of underrepresentation of the

⁴⁴ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 288. See also Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), pp. 94-95 on international legal universality.

⁴⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 95.

⁴⁶ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 306 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 118.

⁴⁷ Jack Donnelly, ‘Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)’ (2008) 30 *Human Rights Quarterly* 194, p. 198.

⁴⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 95.

⁴⁹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 8.

⁵⁰ Jack Donnelly on the historical or anthropological universality in Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 286. See also the previous section in this chapter on the historical origin of human rights.

developing world.⁵¹ Accordingly, it is argued by some that the UDHR is a Western interpretation of human rights that might not be suitable for non-Western societies.⁵² With respect to the latter argument, Flinterman observed that this denies the fact that all States and peoples have accepted the UDHR. He also noted this argument does not do justice to the development of human rights instruments which are formulated from the 1960s onwards and to which States all over the world have contributed.⁵³

With respect to universality in terms of *anthropological of philosophical acceptance*, Brems noted that “the most heated debates” occur in anthropological or philosophical terms.⁵⁴ She furthermore observed that “even when the universality concept itself is not defined in this way but rather in a normative matter [conform the first notion of universality discussed above], universal acceptance is frequently considered to be a precondition of universality”.⁵⁵ She concluded that the outcome of this quest for universality depends on what one aims to discover. A UNESCO sponsored research report observed for instance, “the concept of human rights itself, at the level of explicit theories, legal rule or objective ethnological description is not universal. Yet the existential roots of human rights, the fundamental requirement that a certain respect is due to human beings, can be found across the world.”⁵⁶ So in philosophical or anthropological terms, the focus lies on these universal roots, while one cannot speak of universality when one tries to find the concept of human rights as such in each culture.⁵⁷

Donnelly speaks of anthropological or historical or cultural universality, which he argues is lacking: “There may be considerable historical/anthropological universality of values across time and culture. No society, civilization, or culture prior to the seventeenth century, however, had a widely endorsed practice, or even a

⁵¹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 9.

⁵² See amongst others Adamantia Pollis and Peter Schwab, 'Human Rights: A Western Construct with Limited Applicability' in Christof Heyns and Karen Stefiszyn (eds), *Human Rights, Peace and Justice in Africa: A Reader* (UPEACE Series on Peace and Conflict in Africa, Pretoria University Law Press, Pretoria 2006).

⁵³ Cees Flinterman, 'De Universaliteit van Mensenrechten' in Cees Flinterman and Theo van Boven (eds.), *Universaliteit van Mensenrechten: Fundamenteel en Controversieel* (Stichting NJCM Boekerij, Leiden 1992), p. 69.

⁵⁴ According to Donnelly, anthropological and ontological universality are indefensible. Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, pp. 281, 284-286, 292-293.

⁵⁵ Eva Brems, *Human Rights: Universality and Diversity*, (Martinus Nijhoff Publishers, The Hague 2001), p. 9.

⁵⁶ Eva Brems, *Human Rights: Universality and Diversity*, (Martinus Nijhoff Publishers, The Hague 2001), p. 9, hereby referring to Jeanne Hersch, 'Le concept de droits de l'homme est-il un concept universel?' *Cadmos* 1981, pp. 19-20.

⁵⁷ Eva Brems, *Human Rights: Universality and Diversity*, (Martinus Nijhoff Publishers, The Hague 2001), p. 9.

vision, of equal and inalienable individual human rights”.⁵⁸ Instead human rights are a response to the threats posed by modern markets and modern States.⁵⁹ This is connected to his idea that human rights are relative in specification, in the sense that human rights “reflect a process of social learning with respect to historically particular and contingent standard threats to human dignity”.⁶⁰ As said before, he observed that Islamic, Confucianism and traditional African societies did not develop substantial bodies of human rights ideas or practices before the twentieth century.⁶¹ This is also related to universality in terms of time.

On *functional acceptance or universality as an existential reality*,⁶² Brems noted that “it may be said that human rights are universal because human beings in all parts of the world, of all backgrounds, cultures, religions and ideologies, experience the need of the protection they offer and recognise their existence and their value by appealing to them”.⁶³

Donnelly dealt with the notion of functional universality, which he formulated as “the claim that human rights perform certain functions”. He specified these functions as protection against certain standard threats to human dignity that are posed by modern markets and States in most places in the contemporary world.⁶⁴ He argued that human rights are in this respect the most effective response to assure human dignity.⁶⁵ According to Donnelly, human rights provide this remedy for a growing number in all regions:

Whatever our other problems, we all must deal with market economies and bureaucratic states. Whatever our other religions, moral, legal, and political resources, we all need equal and inalienable universal human rights to protect us from those threats.⁶⁶

⁵⁸ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, pp. 284-285.

⁵⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 99.

⁶⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 99.

⁶¹ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 286.

⁶² Eva Brems, *Human Rights: Universality and Diversity*, (Martinus Nijhoff Publishers, The Hague 2001), p. 10, hereby referring to Clarence J. Dias, ‘The Universality of Human Rights: A Critique’ (1993) 103 *Lokayan Bulletin* 43, pp. 43-48. See also Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, pp. 286-288.

⁶³ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 10.

⁶⁴ Jack Donnelly, ‘Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)’ (2008) 30 *Human Rights Quarterly* 194, p. 197 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 97.

⁶⁵ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, pp. 287-288 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 97.

⁶⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 97.

Universality in terms of *multicultural composition of human rights* is, according to Brems, a rather widespread notion that asserts that universal human rights “must contain elements of all different cultures and be apt to respond to the needs of people living in very diverging contexts and circumstances”.⁶⁷ This corresponds to Van Boven’s second dimension of universality, the dimension of *universal values*.

This concept revolves around the question whether the human rights as stipulated in international documents are regarded and accepted as common values in all societies and cultures. According to Brems, it could be argued that the current international human rights system is universal in this sense and has undergone a significant expansion and modification since 1948.⁶⁸ She furthermore observed that most authors who use this idea of universality are of the opinion that human rights should incorporate non-Western elements as these rights are not yet sufficiently multicultural. Cultural and ideological diversity is, in other words, embraced, rather than being considered as a threat to the universality of human rights.⁶⁹

The idea that human rights are strengthened by cultural and ideological diversity, can for example also be read into Shaw’s observation that the concept of human rights is closely related to ethics and morality.⁷⁰ He stated in this respect that “those rights that reflect the values of a community will be those with the most chance of successful implementation”.⁷¹

Brems furthermore observed that universality taken as *world-wide observance of human rights* is only mentioned in the negative mode or as an aspiration because human rights are violated in different parts of the world.⁷² This aspiration is for example included in the UDHR, in which the ambition of securing universal acceptance and effective recognition and observance of human rights was amongst others included.⁷³

Universality can also be interpreted as *general opposability of human rights*. Human rights are universal “because they must be respected by, and hence can be

⁶⁷ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 10.

⁶⁸ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 11.

⁶⁹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 11-12.

⁷⁰ Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge 2008), p. 266.

⁷¹ Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press, Cambridge 2008), p. 266.

⁷² Eva Brems, *Human Rights: Universality and Diversity*, (Martinus Nijhoff Publishers, The Hague 2001), p. 12 hereby referring to Peter Baehr, ‘Universaliteit van mensenrechten: is het, kan het, moet het?’ in Nick J.H. Huls (ed), *Grenzen aan mensenrechten* (NJCM Boekerij, Leiden 1995) and Asbjørn Eide, ‘Making Human Rights Universal: Unfinished Business’ (1998) *Nordic Journal on Human Rights* 51.

⁷³ UN General Assembly Resolution 217 (III) (*Universal Declaration of Human Rights*), UN Doc. A/Res/217, 10 December 1948, preamble.

invoked against everybody”.⁷⁴ According to Brems, this means that the protection and promotion is a duty of all States at the minimum, but “comes down to all-inclusiveness at the level of perpetrators”.⁷⁵

Human rights as legitimate concern of the international community is a form of universality that opposes claims for national sovereignty and non-interference. Human rights in this sense are a legitimate or even a mandatory concern of the international community.⁷⁶ In other words, this notion corresponds to the idea that human rights are not considered to be part of the internal affairs of a State alone.

Issues related to national sovereignty and non-interference were also at stake during the 1993 World Conference, which led to the adoption of the 1993 Vienna Declaration and Programme of Action (Section 3.4 of this Chapter). When relating this to ASEAN, ASEAN refers to the universality of human rights, while also stressing the idea of non-interference. The principle of non-interference is discussed further in Section 3 of Chapter IV.

Universality interpreted as *absence of double standards* can complement universality in the form of all-inclusiveness and is an oft-heard principle of international human rights law.⁷⁷ Specifically, it entails “the obligation to be consistent in the use of standards to evaluate the human rights situation in different parts of the world and in the consequences derived from such evaluations in terms of judgments and/or sanctions”.⁷⁸ Furthermore, Brems correctly argued that it is logical to prohibit discrimination among perpetrators of human rights violations in case universality is conceived as equality and non-discrimination.⁷⁹

Universality can also be related to the *priority of human rights*. Although an essential characteristic of human rights is their prominent place in the hierarchy of norms, Brems argued that “it seems preferable to treat it either as a separate trait or as a consequence or concomitant of the universality of human rights”.⁸⁰

Universality in terms of the *indivisibility of human rights* means that all human rights are equally important; exclusion of certain (categories of) rights is not

⁷⁴ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 12.

⁷⁵ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 12-13.

⁷⁶ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 13.

⁷⁷ This principle is often brought forward by non-Western States and is amongst others included in the 1993 (Governmental) Bangkok Declaration on Human Rights, preamble and Article 7, see UN World Conference on Human Rights, Final declaration of the regional meeting for Asia of the World Conference on Human Rights, 7 April 1993, A/CONF.157/ASRM/8, A/CONF.157/PC/59.

⁷⁸ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 13, hereby referring to Advisory Council on International Affairs, ‘Universality of Human Rights: Principles, Practice and Prospects’, No. 63, November 2008, p. 15.

⁷⁹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 13.

⁸⁰ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 14.

permitted.⁸¹ The idea of indivisibility is part of an oft-heard adagio in international human rights law, *i.e.* that human rights are universal, indivisible, interdependent and interrelated.⁸² It is striking that it is often mentioned alongside the universality of human rights, whilst Brems considered indivisibility as a separate aspect or variant of universality. Peter Leuprecht, for instance, considered indivisibility, alongside universality and solidarity, as one of the three pillars of ‘the human rights edifice’.⁸³

With respect to universality related to *the uniformity of standards*, some authors stressed that universality does not require uniformity; diversity is in other words permitted. These authors treat the universality of human rights as an absolute normative concept, as opposed to others who use it as a relative concept. The latter refers to “uniformity of standards across different contexts, as opposed to openness for contextual diversity”.⁸⁴

Van Boven for instance elaborated on uniformity as one of the dimensions of universality. He observed that universality must not be confused with uniformity because these words are no synonyms of each other. According to Van Boven, universality means that all people have human rights (inclusiveness). Uniformity is not implied; differences in societies must be respected. This is, for example, affirmed by the rights for minorities and indigenous people(s).⁸⁵

With respect to *universality in time*, Brems observed that universality is generally conceived at the empirical level when examining the past. According to Brems, “the further one goes back in the past, the less likely one is to find human rights. Yet at a very abstract and general level, similarities of root concepts can always be found”.⁸⁶ This can also be compared with universality in terms of origin. When looking at the future, this author noted that a shift is made to the normative level in the sense of eternal validity.

Donnelly, however, underscored that what he calls international legal universality and functional universality are contingent and relative. He argued as follows:

It depends on states deciding to treat the Universal Declaration and the Covenants as authoritative. Tomorrow, they may no longer accept or give as much weight to

⁸¹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 14.

⁸² UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, para. 5.

⁸³ Peter Leuprecht, ‘Universality and Diversity’ in Colleen Sheppard and François Crépeau (eds), *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p. 11.

⁸⁴ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 15.

⁸⁵ Theo van Boven, ‘Inleiding’ in Cees Flinterman and Theo van Boven (eds), *Universaliteit van Mensenrechten: Fundamenteel en Controversieel* (Stichting NJCM Boekerij, Leiden 1992), p. 3-5.

⁸⁶ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 15.

human rights. Today, however, they clearly have chosen, and continue to choose, human rights over competing conceptions of national and international political legitimacy.⁸⁷

In addition, his idea of historical or anthropological relativity assumes that human rights “were not present in “traditional (non-state and nonmarket) societies, and there is no reason to assume that they will apply in very different types of societies in the future.”⁸⁸

A similar line of reasoning can also be found in earlier literature. Norberto Bobbio, for instance, stressed that “human rights however fundamental are historical rights and therefore arise from specific conditions characterized by the embattled defence of new freedoms against old powers. They are established gradually, not all at the same time, and not for ever [sic]”.⁸⁹ Others have also underscored relativity in terms of time, such as Joseph Raz who argued that “[t]he more plausible claim is that human rights are synchronically universal, meaning that all people alive today have them”,⁹⁰ as it would be absurd to contend that cave dwellers in the Stone Age also had those rights”.⁹¹

The concept of *universality as a process* regards the universality of human rights as a claim or goal, while conceptually speaking, human rights must be universal.⁹² When examining the aforementioned ideas of universality, Brems rightfully noted that the multicultural composition of human rights has the strongest aspirational content. This is different from the static conception that focuses on the empirical analysis, whereby the universality in terms of historical origin is the most static.⁹³

When reading the work of Donnelly, yet another form of universality is visible, which he called the *overlapping consensus universality*.⁹⁴ Ultimately in essence the idea is that human rights are endorsed as a political conception of justice in a

⁸⁷ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 289.

⁸⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 99.

⁸⁹ Norberto Bobbio, *The Age of Rights* (Cambridge: Polity Press 1996), xi referred to by Zehra F. Kabasakal Arat, ‘Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights’ in José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p. 390.

⁹⁰ Joseph Raz, ‘Human Rights in the Emerging World Order’ (2010) 1 *Transnational Legal Theory* 31, p. 41.

⁹¹ Joseph Raz, ‘Human Rights in the Emerging World Order’ (2010) 1 *Transnational Legal Theory* 31, p. 40.

⁹² Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 15.

⁹³ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 15-16.

⁹⁴ Other authors also universal human rights as the result of an overlapping consensus among various cultures, such as Fan Jizeng, ‘The Relative Universality of Human Rights: Theory and Practice’ [2013] (2) *Human Rights* 27.

variety of comprehensive religious and philosophical doctrines, whereby he observed the following:

Today, however, the moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all regions of the world. This convergence, both within and between civilizations, provides the foundation for a convergence on the rights of the Universal Declaration. In principle, a great variety of social practices other than human rights might provide the basis for realizing foundational egalitarian values. In practice human rights are rapidly becoming the preferred option.⁹⁵

From this notion follows that human rights have multiple foundations, giving human rights ‘foundational relativity.’⁹⁶ A single trans-historical foundation, or what Donnelly calls *ontological universality*, accordingly lacks as “[h]uman rights are not part of the natural fabric of reality; they do not apply everywhere and at all times.”⁹⁷ (See also universality in terms of time) It appears that Leuprecht followed the same line of reasoning as Donnelly used in his argumentation on the overlapping consensus universality. Specifically, Leuprecht formulated:

A meaningful intercultural dialogue should include the essential issues of human rights. Whilst defending the universality of human rights, I believe that one can get to human rights by different ways and that the different cultures and civilizations of the world can and should contribute to the “common understanding” of human rights to which the Preamble of the Universal Declaration refers.⁹⁸

This research focuses on ASEAN and (the development of) its human rights system, in which the ASEAN region offers the contextualisation of human rights. Considering the different concepts of the universality of human rights, it is important to ascertain which concept is or which concepts are used in the present research. Brems also offers the answer in this respect as she argued, in short, “in essence the fear about the undermining of universality is a fear about the exclusion of some people from the international human rights protection system, or in other words a concern about the general and worldwide applicability of human rights”.⁹⁹

⁹⁵ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281 p. 289 and also included in Donnelly 2013, p. 96.

⁹⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 99.

⁹⁷ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281 p. 289 and also included in Donnelly 2013, p. 99.

⁹⁸ Peter Leuprecht, ‘Universality and Diversity’ in Colleen Sheppard and François Crépeau (eds), *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p. 15.

⁹⁹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 16.

The all-inclusive character of human rights¹⁰⁰ has a number of connotations, which are consistent with the concepts of universality that Brems analysed in her research. Brems aptly observed that the other conceptions of universality can be discussed “as either potential necessary conditions for universality or potential necessary consequences or concomitants of universality”.¹⁰¹ More specifically, because being human is the only criterion, human rights are also equally applicable to all; all humans enjoy the same human rights.¹⁰² Furthermore, these rights are inalienable because one cannot stop being human and, subsequently, one will always have these rights.¹⁰³

Important to this research is the issue to what extent diversity is allowed based on international human rights law.¹⁰⁴ In other words, the question is to what extent current international human rights law allows relativistic interpretations or particularities without impeding the claim to the universality of human rights; a context which in the ASEAN region was initially influenced by ‘Asian values’, or as Vitit Muntarbhorn preferred to put it, ‘values in Asia’ because Asia is so heterogeneous.¹⁰⁵

A lesson learned from the Asian values debate is that one must be realistic in the sense that relativistic viewpoints can detract from the universalist human rights framework. More specifically, an interpretation could in fact restrict a certain human right that could diminish the value of that human right to a point that it no longer exists anymore. In addition, human rights can also be downgraded in the

¹⁰⁰ See for example Theo van Boven, ‘Inleiding’, in Cees Flinterman and Theo van Boven (eds), *Universaliteit van Mensenrechten: Fundamenteel en Controversieel* (Stichting NJCM Boekerij, Leiden 1992), pp. 2-3. The author rightly argued that the universality of human rights is not the same as uniformity: differences in societies must be respected; Theo van Boven, ‘Inleiding’ in Cees Flinterman and Theo van Boven (eds), *Universaliteit van Mensenrechten: Fundamenteel en Controversieel* (Stichting NJCM Boekerij, Leiden 1992), pp. 3-4.

¹⁰¹ Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff Publishers, The Hague 2001), p. 16.

¹⁰² While human rights are applicable to everyone, differences in interpretation are possible. A clear example is the margin of appreciation doctrine used by the European Court of Human Rights when interpreting the European Convention on Human Rights.

¹⁰³ See amongst others also Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 10 and Alistair M. Macleod, ‘The Structure of Arguments for Human Rights’ in David A. Reidy and Mortimer N.S. Sellers (eds), *Universal Human Rights Moral Order in a Divided World* (Philosophy and the Global Context, Rowman & Littlefield, Lanham 2006), p. 23. See also for example UN General Assembly Resolution 217 (III) (*Universal Declaration of Human Rights*), UN Doc. A/Res/217, 10 December 1948.

¹⁰⁴ This corresponds the vision of the Advisory Council on International Affairs in its report on the universality of human rights. See Advisory Council on International Affairs, ‘Universality of Human Rights: Principles, Practice and Prospects’, No. 63, November 2008.

¹⁰⁵ Vitit Muntarbhorn explicitly refers to values in Asia instead of Asian values, see amongst others Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), p. 8, as well as during the interview with the author; Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

event the implementation mechanisms to ensure the actual enjoyment of these rights are defective. Therefore, the next section focuses on universalism and relativism and the choice for Donnelly's 'relative universality'.

3.2 Universalism, relativism and relative universality

When discussing the universality of human rights, the debate with respect to the notions of universalism and relativism comes into play. This debate is concerned with the question in which way human rights should be interpreted and applied across the world. While at first the general tendency was to consider universalism and relativism as opposites of one another, in recent decades efforts have been made to move beyond this dichotomy.

Initially, universalism and relativism were often considered as each other's extremes when analysing the room for discretion in the interpretation of human rights: the more one is in favour of universalism, the less room is left for relativism, and *vice versa*. This is visible *inter alia* in Donnelly's work in the beginning of this millennium, who captured this sliding scale in terms of radical universalism and strong cultural relativism as each other's extremes. Weak cultural relativism or strong universalism formed the middle ground on which the universality of human rights was the starting point, but where local variations, albeit in a limited form, were allowed.¹⁰⁶

Universalism means that all human rights can be applied everywhere the same, because the morals on which human rights are founded are also similar among the different countries.¹⁰⁷ Universalists focus on the similarities and the consensus that exist among countries, whereas cultural relativists focus on cultural differences.

Radical universalism in the sense that culture is completely irrelevant to human rights cannot be followed, as this would deny the cultural diversity currently present in the world. Moreover, it would be contradictory to the conclusions reached at the 1993 Vienna Conference and implies the risk of moral imperialism. In this respect, it is important to bear in mind that at times non-Western States consider the

¹⁰⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 90. Donnelly compared his work to other authors, whereby he posed himself towards the universalist end, Richard Wilson toward the relativist end and Andrew Nathan more at the centre of the spectrum of universalism and relativism. Richard Wilson argued that the ideas of and struggle for human rights "are embedded in local normative orders and yet are caught within webs of power and meaning which extend beyond the local." Andrew Nathan proposed "tempered universalism" in which human rights are treated as fundamentally universal, but substantial space is allowed for variations in implementing these universal norms; cited by Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 119 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 104. Donnelly stressed in this regard that it is for States not possible to "legitimately just pick and choose among internationally recognized human rights", the variance in legitimate interpretations is thus limited; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 119.

¹⁰⁷ András Sajó, 'Introduction' in András Sajó (ed), *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff Publishers, Leiden 2004).

international human rights regime to be a new form of Western imperialism. Moral imperialism, however, should be avoided. Donnelly rightly formulated the following warning:

The legacy of colonialism demands that Westerners show special caution and sensitivity when advancing arguments of universalism in the face of clashing cultural values. Westerners must also remember the political, economic, and cultural power that lies behind even their best intentioned activities. Anything that even hints of imposing Western values is likely to be met with understandable suspicion, even resistance. How arguments of universalism and arguments of relativism are advanced may sometimes be as important as the substance of those arguments.¹⁰⁸

Connected to this, he continued by stating that international legal and overlapping consensus universality (discussed in the previous section) “can provide important protection against the arrogant “universalism” of the powerful”.¹⁰⁹ He also underscores that peaceful action should – naturally – also be allowed. Specifically, he observed that caution and sensitivity by the West should not be confused with inattention or inaction as international human rights norms demand for such action.¹¹⁰

Nowadays, the dangers of extreme versions of universalism and relativism are generally recognised.¹¹¹ Indeed, universality in terms of universal application is unwarranted in human rights practice.¹¹² A critical stance towards universalism denotes, for instance, that universalism does not mean that legal transplants are able to take place without any consideration for culture. Päivi Koskinen argued in this respect that “it is not for “outsiders” to decide how human rights should be protected in another country, but they can influence the decision making”.¹¹³

The relevant question remains what room is available for relativistic attitudes or particularities in the international human rights regime. David A. Reidy and Mortimer N.S. Sellers described the relativistic element of human rights as follows:

¹⁰⁸ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 304.

¹⁰⁹ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 304.

¹¹⁰ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 304.

¹¹¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 103-104.

¹¹² Miodrag A. Jovanovic, ‘Human Rights - Universality and Context-Sensitive Implementation’ in Bojan Spaić and Kenneth Einar Himma (eds), *Fundamental Rights: Justification and Implementation* (Democracy and the Role of Law, Eleven Publishers International, The Hague, Forthcoming), p. 5. Available at <SSRN: <https://ssrn.com/abstract=2641275>> accessed 8 September 2018.

¹¹³ Päivi Koskinen, ‘“Asian Values”, Gender, and Culture Specific Development’ in Leena Avonius and Damien Kingsbury, *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Pallgrave Macmillan, New York 2008), p. 169. Koskinen made this argument in the context of the empowerment of women. It is, however, also applicable to the protection of human rights in general.

Many [human rights] are universal only in the weaker sense of setting core normative considerations and fundamental normative limits applicable to all people everywhere, considerations and limits that permit a substantial degree of discretionary judgment and thus reasonable disagreement.¹¹⁴

Cultural relativism has taken up a major role in the universalism-relativism debate. Proponents of cultural relativism propose a decisive impact for cultural differences in applying international human rights standards.¹¹⁵ Key to this doctrine is the notion that there are variations between different societies, and that there are no legitimate reasons allowing for outsiders to utter critique on certain differing aspects of a culture.¹¹⁶ Radical critics deny the global relevance of human rights, arguing that human rights are a limited tribal concept. Others conclude that human rights, as an historical cultural product, must be subject to the laws of social evolution and that it is up to social actors to shape and renegotiate the meaning of the product. A milder version of cultural relativism argues that human rights in their present form represent a culturally limited experience of dubious political aspirations.¹¹⁷

While a critical stance towards extreme forms of universalism should be taken, this is also true towards cultural relativism. Koskinen rightfully underlined, for instance, that too much stress on cultural values “can be counterproductive” to general principles of international law and that “cultural values are not static”.¹¹⁸ Donnelly concluded in this respect that radical and strong cultural relativism are not viable. The first implies that culture is the only source of the validity of a moral right or rule, whereas the latter would imply that “culture is the principal source of the validity of a right or rule”.¹¹⁹ By placing too much weight on culture, the fact that human rights are also influenced by other elements is disregarded.

Weak cultural relativism (or strong universalism), according to Donnelly in his earlier work, “considers culture a secondary source of the validity of a right or rule. Universality is presumed, but the relativity of human nature, communities, and rules checks potential excesses of universalism. At the furthest extreme, weak cultural

¹¹⁴ David A. Reidy and Mortimer N.S. Sellers (eds), *Universal Human Rights Moral Order in a Divided World* (Philosophy and the Global Context, Rowman & Littlefield, Lanham 2006), p. 3.

¹¹⁵ Lynda S. Bell, Andrew J. Nathan and Ilan Peleg (eds), *Negotiating culture and human rights* (Columbia University Press, New York 2001), p. 5.

¹¹⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 89.

¹¹⁷ András Sajó, ‘Introduction’ in András Sajó (ed), *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff Publishers, Leiden 2004).

¹¹⁸ Päivi Koskinen, “‘Asian Values’, Gender, and Culture Specific Development’ in Leena Avonius and Damien Kingsbury, *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Pallgrave Macmillan, New York 2008), p. 169.

¹¹⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 90.

relativism recognizes a comprehensive set of prima facie universal human rights but allows limited local variations.”¹²⁰

In the field of human rights, a moderate form of a relativistic position has the following implications. Although human rights are intrinsic to being human, these rights must be interpreted and applied according to the context of a particular society. Specifically, this view holds that human rights must be contextualised in light of political, economic, social and cultural factors. Human rights, according to Naruemon Thabchumpon, thus need cultural legitimacy.¹²¹ This notion was *inter alia* affirmed during the 1993 Vienna Conference.

It might, however, be better to speak of relativism in a broader sense, instead of cultural relativism. From the previous section, it follows that human rights are relative to multiple factors. In addition, culture is not static, making it difficult to ascertain what is meant with ‘culture’ in terms of ‘cultural’ relativism. Alternatively, one should interpret ‘culture’ – in line with, for instance, Thabchumpon – at least in a broad manner, encompassing various particularities.

Donnelly aptly distinguished cultural relativity from cultural relativism. The first means that “cultures differ, often dramatically over space and time”, while the latter “imbues culture with an overriding descriptive force”.¹²² He hereby correctly observed that cultural relativity is undeniable as moral rules and social institutions vary among cultures and over time.¹²³ Yet, he argued that culture is not significant for the development of ideas and practices of human rights with regard to the notion of what rights humans possess.¹²⁴ This is in line with his argument that cultural differences pose only a “modest challenge to the contemporary normative universality of human rights”.¹²⁵ Instead, it is important to the advocacy for and reception of internationally recognised human rights.¹²⁶ In this respect, Daniel A. Bell argued that “if the ultimate aim of human rights diplomacy is to persuade others of the value of human rights, it is more likely that the struggle to promote

¹²⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 90.

¹²¹ Naruemon Thabchumpon, 'Human Rights in Thailand: Rhetoric or Substance on "Asian Values"' in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Palgrave Macmillan, New York 2008), p. 143.

¹²² Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 108.

¹²³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 89 and also Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 106, where he states that “cultural diversity is a social fact”.

¹²⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 89.

¹²⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 89.

¹²⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 106.

human rights can be won if it is fought in ways that build on, rather than challenge, local cultural traditions”.¹²⁷

Donnelly’s model of concepts, conceptions and implementation

From a closer reading of Donnelly’s research, it follows that for advocating universality in our diverse world, and hereby balancing universality and context-sensitivity, he formulated his three-level scheme of ‘substance’, ‘interpretation’ and ‘form’.¹²⁸ This scheme is further elucidated in his later work as ‘concepts’, ‘conceptions’ and ‘implementation’. The added value of Donnelly’s line of reasoning can in essence be explained as follows:

We do not face an either-or choice between cultural relativism and universal human rights. Rather, we need to recognize both the universality of human rights and their particularity and thus accept a certain *limited* relativity, especially with respect to forms of implementation. We must take seriously the initial paradoxical idea of the relative universality of internationally recognized human rights.¹²⁹

More specifically, the added value of his scheme for the present research is that a distinction can be made on which levels universality is reached and on which levels legitimate variations are able to exist. Consequently, it becomes increasingly possible to pinpoint the difficulties in ASEAN’s human rights system.¹³⁰ As his three-level scheme is used for the present research, it is now analysed in more detail.

Donnelly’s scheme is part of his idea of ‘the relative universality of human rights’¹³¹ (discussed in the previous section), which is “a form of universalism that

¹²⁷ Daniel A. Bell, ‘The East Asian Challenge to Human Rights: Reflections on an East West Dialogue’ (1996) 18 *Human Rights Quarterly* 641, p. pp. 652.

¹²⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 93-98. Here he spoke of the evaluation of cultural relativism, while in later work it is used in terms of context-sensitivity.

¹²⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 98.

¹³⁰ It is especially the level of the implementation of human rights that is the most problematic; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97. Important to note is that the research will not come to an ‘either or choice’ on cultural relativism and universal human rights. This according to Donnelly’s “relative universality of internationally recognized human rights”; Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 98. Others have opted for a similar approach, see Richard Wilson’s “Introduction” in Richard Wilson (ed), *Human Rights, Culture and Context: Anthropological Perspectives* (Pluto Press, London 1997) and Andrew J. Nathan, ‘Universalism. A Pluralistic Account’ in Lynda S. Bell, Andrew J. Nathan and Ilan Peleg (eds), *Negotiating culture and human rights* (Columbia University Press, New York 2001).

¹³¹ Jack Donnelly has written extensively on universalism and (cultural) relativism. See his overview of his contributions Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, footnote 1.

also allows substantial space for important (second-order) claims of relativism”.¹³² This seems to match State practice, as the Dutch Advisory Council of International Affairs for instance observed that “[w]hen a State itself (as opposed to local or tribal communities) invokes culture, it is mainly within the framework of universal human rights protection”.¹³³

As explained above, Donnelly initially considered universalism and relativism as a two-dimensional sliding scale, while in later work he proposed that is better to speak of a multiple space as there are different kinds of universality and relativity. This idea of a multiple space does justice to the observations in the previous section, in which the diversity in universality and relativity is explained. Within this multiple space, both relativity and universality are considered to be “essential to international human rights”.¹³⁴ Key to his idea are the following observations:

Functional and overlapping consensus universality lie primarily at the level of concepts. Most of the Universal Declaration lies at this level as well. Although international human rights treaties often embody particular conceptions, and sometimes even particular forms of implementation, they too permit a wide range of particular practices. Substantial second order variation, by country, region, culture, or other grouping, is completely consistent with international legal and overlapping consensus universality.¹³⁵

In earlier work, Donnelly stated that “[e]ven weak cultural relativists – that is, strong universalists – are likely to allow considerable variation in the form in which rights are implemented. (...) Important differences between strong and weak relativists are likely to arise, however, at the levels of interpretation and, especially, substance.”¹³⁶ This led to his argument that a distinction must be made in terms of substance or concept, interpretation and form when evaluating arguments of (cultural) relativism,¹³⁷ whereby:

Concepts [substance] set a range of plausible variations among conceptions [interpretation], which in turn restrict the range of practices that can plausibly be considered implementations [form] of a particular concept and conception.¹³⁸

¹³² Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 282.

¹³³ Advisory Council on International Affairs, ‘Universality of Human Rights: Principles, Practice and Prospects’, No. 63, November 2008, p. 16.

¹³⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 104.

¹³⁵ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007), 29 *Human Rights Quarterly* 281, p. 300.

¹³⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 93-94.

¹³⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 93-98.

¹³⁸ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 300.

From his notion follows that the room for legitimate variation is the smallest at the level of concepts, and the largest at the level of implementation. According to Donnelly, interpretation and implementation are matters of legitimate variation, as long as “they fall within the range of variation consistent with the overarching concept”.¹³⁹

Donnelly described the level of concepts or substance as “an abstract, general statement of an orienting value”.¹⁴⁰ His argument for universality lies at this level only. According to this scholar, functional and overlapping consensus lie primarily at this level, as well as most of the UDHR.¹⁴¹ Taking Articles 3-12 UDHR as an example, he claimed that only at the level of these abstract and general statements do consensus exist. It is also at this level at which most appeals to cultural relativism fail, as these rights “are so clearly connected to basic requirements of human dignity, and are stated in sufficiently general terms that virtually every morally defensible contemporary form of social organization must recognize them (although not necessarily as inalienable rights)”.¹⁴²

Although for Donnelly civil rights such as the freedom of conscience, speech and association, and economic and social rights included in the UDHR may be “a bit more relative”,¹⁴³ he argued that it is hard to imagine “a defensible conception of human dignity that did not include (almost all) of these rights”.¹⁴⁴ Bearing this in mind, Donnelly rightfully warned that one must not read too much into the consensus reached at this level, as one might lose sight of the disagreements on definitions and systematic implicit limitations across civilisations, which in turn could pose challenges to the universalist arguments. Yet, one should be wary of “overstating their importance of misinterpreting their character”.¹⁴⁵ Specifically, Donnelly argued that significant variations at the level of concepts, as well as systematic variations in interpretation that undermine conceptual consensus are largely not present. This is backed up by the general similarity of the (at the time of

¹³⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 103.

¹⁴⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 94. In later work, he argued that functional and overlapping consensus universality lie primarily at this level; Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 299.

¹⁴¹ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 209.

¹⁴² Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 94 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 100.

¹⁴³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 94 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 100.

¹⁴⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 94.

¹⁴⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 95

research existing) regional human rights instruments¹⁴⁶ and the fact “that there are strong and increasingly deep international legal and overlapping consensuses on internationally recognized human rights”.¹⁴⁷

Donnelly’s second level is the level of conceptions or interpretation, as concepts need to be interpreted. According to Donnelly, divergence in interpretation or conceptions does not necessarily pose a challenge to the universality of human rights. Rather, “variations in interpreting rights seem not merely defensible but desirable, and even necessary”.¹⁴⁸ He also contended that these interpretations are “not free associations or arbitrary, let alone self-interested, stipulations”.¹⁴⁹ Accordingly, he argued that *plausible* and *defensible* interpretations are also quite modest and that this divergence is less traceable to culture as cultural relativists might imply.¹⁵⁰

At this level, he aptly refers to Walter Bryce Gallie. This author argued that certain human rights are “essentially contested concepts”, of which Donnelly noted that in these concepts “there is a substantial but rather general consensus on basic meaning coupled with no less important, systematic, and apparently irresolvable conflicts of interpretation”.¹⁵¹ For Donnelly, culture is one of the plausible and defensible mechanisms to select interpretations and forms, while it is likely that the number of plausible and defensible interpretations is modest.¹⁵² He observed that significant divergences in interpretation exist not only between, but also within, cultures or civilisations. Donnelly observed in this respect that Europe and the United States differ in opinion on the death penalty, while Japan and Vietnam hold different interpretations on the freedom of speech and association. In addition, he argued that “even where variations in practice exist, culture does much less explanatory work than most relativists suggest – or at least that the “culture” in question is more local or national rather than regional or a matter of civilization”.¹⁵³ Relevant to the research is Donnelly’s claim that communitarian, consensual Asian

¹⁴⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 95.

¹⁴⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 101.

¹⁴⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 96.

¹⁴⁹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 102.

¹⁵⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 97.

¹⁵¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 96.

¹⁵² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97.

¹⁵³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97.

societies as opposed to individualistic, competitive Western societies explains less than proponents of relativism argue.¹⁵⁴

The third level is implementation or form, as interpretations need to be implemented in law and practice. Regarding this level, Donnelly argued that “[t]he range of actual and defensible variation here is considerable –although limited by the governing concept of interpretation.”¹⁵⁵ He argued that differences in interpretation seem to have a limited connection to culture or cultural difference and that other causes for differences in implementations, such as levels of economic development of unique cultural historical experiences can be equally important.¹⁵⁶

Donnelly argued for universality at the level of the concept, while “[t]he ways in which these rights are implemented, however, so long as they fall within the range of variation consistent with the overarching concept, are matters of legitimate variation.”¹⁵⁷ Divergence on the other two levels can thus still lead to the universality of human rights. These non-exhaustive options are according to Donnelly as follows:

1. Overlapping consensus on the substance despite diversity in interpretations and implementations;
2. Despite differences at the level of substance or concept, there is a large common core with minor differences in its periphery;
3. Despite substantial differences there are “strong statistical regularities and the outliers are few and clearly overshadowed by the central tendency”.¹⁵⁸

The added value of Donnelly’s line of reasoning is of relevance when balancing between the universality of human rights and the interpretation and implementation of human rights in a context sensitive way, all within the framework of the universality of human rights. Donnelly hereby stressed that “we should talk more of the relative *universality* of human rights, rather than their *relative* universality”.¹⁵⁹ His view implies that “universal human rights, properly understood, leave considerable space for national regional, cultural particularity and other forms of diversity and relativity”.¹⁶⁰ This fits ASEAN seamlessly, as the ASEAN region has

¹⁵⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97.

¹⁵⁵ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97.

¹⁵⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97.

¹⁵⁷ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 97 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 103.

¹⁵⁸ Donnelly 2003, p. 98.

¹⁵⁹ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 292.

¹⁶⁰ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 281.

underlined throughout the years the universality of human rights, whilst leaving room for national and regional particularities.

Donnelly formulated four criteria in order to judge divergences from international human rights norms that support deviations from authoritative international human rights norms, which are possible according to the notion of relative universality. This can be best read in his original words:

- 1) Important differences in threats are likely to justify variations even at the level of concepts. Although perhaps the strongest theoretical justification for even fairly substantial deviations from international human rights norms, such arguments rarely are empirically persuasive in the contemporary world. (Indigenous peoples may be the exception that proves the rule.)
- 2) Participants in the overlapping consensus deserve a sympathetic hearing when they present serious reasoned arguments justifying limited deviations from international norms. Disagreements over "details" should be approached differently from systematic deviations or comprehensive attacks. If the resulting set of human rights remains generally consistent with the structure and overarching values of the Universal Declaration, we should be relatively tolerant of particular deviations.
- 3) Arguments claiming that a particular conception or implementation is, for cultural or historical reasons, deeply imbedded within or of unusually great significance to some significant group in society deserve, on their face, sympathetic consideration. Even if we do not positively value diversity, the autonomous choices of free people should never be lightly dismissed, especially when they reflect well-established practices based on deeply held beliefs.
- 4) Tolerance for deviations should decrease as the level of coercion increases.¹⁶¹

Michael Goodhart commented on Donnelly's relative universalism stating that it is better to use Donnelly's insights, rather than his vocabulary. Instead, Goodhart proposed amongst others that "[h]uman rights are neither relative nor universal. They are legitimate because of their global appeal. That's enough".¹⁶² On Goodhart's suggestion of omitting wordings such as 'relative' and 'universal', Donnelly aptly responded:

It is striking, however, and I think important, that few people actually do. If it proves impossible to clarify the nature of the claims of universality and relativity that are a regular part of discussions of internationally recognized human rights, then maybe a new language is called for. But until then ... [...] The search for alternative formulations thus is at best a supplement to, rather than a replacement for, greater

¹⁶¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 117-117.

¹⁶² Michael Goodhart, 'Neither Relative nor Universal: A Response to Donnelly' (2008) 30 *Human Rights Quarterly* 183, p. 193.

clarity, precision, and sophistication in our understanding of the universality and relativity of human rights.¹⁶³

In addition, Donnelly is correct when he stated that legitimacy cannot be based on popularity, and that there are other grounds for human rights.¹⁶⁴ If a global appeal and legitimacy are related, then it would be the other way around: due to the legitimacy of human rights, they have a global appeal.¹⁶⁵

The matter of fact is that human rights are still discussed in terms of universality, universalism and relativism. The added value of Donnelly's tree-tiered scheme is considered to be of relevance, as argued *inter alia* by Miod Jovanović. This author observed that this scheme has some limitations; for example, it cannot arbitrate in the ongoing dispute regarding the superiority of normative theories of interpretation. Nevertheless, it is "a useful heuristic tool for reconciling human rights claims to universality and the need for their context-sensitive implementation".¹⁶⁶ It was underlined that it can help to determine which theories are problematic because of their particular nature and specifically, "that this scheme sketches contours of legitimate variations of human rights "concepts" at lower levels of their abstractness, thereby providing some guidelines for adequate interpretative techniques".¹⁶⁷

Donnelly's three-tiered scheme forms the groundwork for the framework used in the present research to assess ASEAN's human rights system. Although some acknowledged the added value, the limitations of the framework were also revealed. The present research complements Donnelly's framework. In this way, the added value of Donnelly's scheme is retained, whilst at the same time a framework is provided in which the ASEAN's human rights system can be analysed in a more integral manner.

Donnelly's framework can be summarised as follows. The level of concepts comprises of certain values whereby the room for differentiation is the smallest. This concept or value is concretised in a human right, or conception, in which more room exists for differentiation. The final level is implementation, in which this right

¹⁶³ Jack Donnelly, 'Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)' (2008) 30 *Human Rights Quarterly* 194, p. 201.

¹⁶⁴ Donnelly mentioned natural law, divine commandment, moral duty, social contract, or the generally utilitarian consequences of accepting such behavioural rule; Jack Donnelly, 'Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)' (2008) 30 *Human Rights Quarterly* 194, p. 202.

¹⁶⁵ Jack Donnelly, 'Human Rights: Both Universal and Relative (a Reply to Michael Goodhart)' (2008), 30 *Human Rights Quarterly* 194, p. 202.

¹⁶⁶ Miodrag A. Jovanovic, 'Human Rights - Universality and Context-Sensitive Implementation' in Bojan Spaić and Kenneth Einar Himma (eds), *Fundamental Rights: Justification and Implementation* (Democracy and the Role of Law, Eleven Publishers International, The Hague, Forthcoming), p. 22. Available at <SSRN: <https://ssrn.com/abstract=2641275>> accessed 8 September 2018.

¹⁶⁷ Miodrag A. Jovanovic, 'Human Rights - Universality and Context-Sensitive Implementation' in Bojan Spaić and Kenneth Einar Himma (eds), *Fundamental Rights: Justification and Implementation* (Democracy and the Role of Law, Eleven Publishers International, The Hague, Forthcoming), p. 22-23. Available at <SSRN: <https://ssrn.com/abstract=2641275>> accessed 8 September 2018.

is in turn concretised and whereby the greatest room for differentiation exists. One of Donnelly's examples illustrates this scheme: according to this author, personal autonomy is a concept that is expressed at the level of conceptions in the freedom of speech. This, in turn, finds its implementation in the criminalisation of pornography.¹⁶⁸ When analysing Donnelly's framework, as far as relevant for its application in the context of the present research, the following observations can be made:

Firstly, Donnelly does not refer to the category of norms of *ius cogens* when speaking of universality at the level of concepts. While *ius cogens* norms have an overlap with a number of rights enshrined in UDHR, given the special status of these non-derogable rights they deserve explicit attention. More specifically, norms of *ius cogens* can be considered as the ultimate rights on which overlapping consensus is reached and of which no derogation is possible. Indeed, these universalistic standards transcend cultural and ideological differences, making local custom or treaties void when their content contradicts these norms.¹⁶⁹ Due to these traits, *ius cogens* norms can be categorised in what Donnelly calls universality in terms of concepts, and more specifically, as the highest attainable level on which consensus is reached. *Ius cogens* standards are, therefore, researched more closely in the next section. In addition, as there is no limitative list of rights that can be qualified as *ius cogens* standards, this research investigates whether the ASEAN region adds rights to the current body of rights that are perceived as *ius cogens* norms, hereby contributing to the universality at the level of concepts. See Section 3 of Chapter II and Subsection 2.1 of Chapter VI for the outcome of this analysis.

Secondly, while Donnelly's framework aims at uncovering the underlying values of human rights, it does not indicate the method in determining whether restrictions to these human rights posed by States are compatible with international human rights law. A certain human right can be formally endorsed by a State, thereby also implicitly acknowledging the underlying value of this right. By formulating interpretative declarations, reservations or limitations, however, this human right can be restricted in such a way that is incompatible with human rights law. In line with this, the underlying value is in essence denied. Accordingly, ASEAN's margin of appreciation in interpreting human rights within the framework of the Vienna Convention on the Law of Treaties will be researched. The particularities that follow from the reservations and interpretative declarations to core UN human rights documents to which the ASEAN Member States are parties, and the constitutions of the ASEAN Member States, are in this respect instructive. More on this, in Sections 2 and 3 of Chapter III.

Thirdly, human rights have to be implemented in adequate human rights mechanisms. In this way, human rights get their practical relevance next to their

¹⁶⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 98.

¹⁶⁹ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge, London 1997), p. 57.

conceptual importance. In addition, Donnelly's idea of the general opposability of human rights also dictates the inclusion of the facet. While Donnelly's level of implementation looks into the further concretisation of human rights, it disregards an assessment of the mechanisms that can be used to give these rights their practical meaning. The present research, therefore, includes an analysis of ASEAN's human rights mechanisms as part of the level of implementation.

This leads to the following adaptation of Donnelly's framework, which covers both the normative and the procedural aspects:

1. Concepts: Which human rights are included in ASEAN's human rights system (including norms of *ius cogens*)? The focal points of this analysis are the ASEAN Human Rights Declaration and the constitutions of the ASEAN Member States.
2. Conceptions: Interpretations and restrictions of human rights in ASEAN and their conformity to international human rights law. The focus lies on the declarations and reservations presented at the moment of ratification of or accession to UN core human rights instruments and on fundamental rights in the Member States' constitutions.
3. Implementation: The way in which human rights are legally protected and promoted in ASEAN's human rights mechanisms. The focus here lies on the ASEAN Way and the ASEAN Intergovernmental Commission on Human Rights.

To sum up, from this section follows that strong universalism and strong cultural relativism are flawed as they do not provide sufficient room for nuances; moderate views are more appealing and in line with practice. While the notion of weak cultural relativism was initially considered the most viable as this takes the universality of human rights as its starting point, but leaves room for cultural particularities, the notion of relative universality provides the necessary nuances when researching the claim to universality of human rights in the ASEAN region. Three levels of universality are distinguished, *i.e.* the level of concepts or substance of human rights, the level of conceptions or their interpretation and the form in which they are implemented.

Although the added value of Donnelly's relative universality is acknowledged, this section also adds aspects to his scheme. In particular, using Donnelly's framework on ASEAN unveiled that this framework needs to be supplemented by an explicit reference to norms of *ius cogens*, the feasibility of human rights curtailments based on international human rights law and the procedural implementation of human rights. By using Donnelly's framework from these angles, the following chapters demonstrate that the ASEAN region shows nuances at all three levels.

3.3 Norms of *ius cogens*

In the previous section, the argument was proffered that *ius cogens* norms are part of what Donnelly described as universality at the level of concepts. This section looks at the concept of *ius cogens* more closely. Since norms of *ius cogens* are subject of numerous studies, this part of the research has only the ambition to briefly discuss the topic as far this is relevant for the research.

Ius cogens norms, or “peremptory norms of general international law”, are obligatory for the international community as a whole¹⁷⁰ and have an *erga omnes* character. Within international law, *ius cogens* norms have a higher status than other obligations and are considered to be non-derogable rights. As said, these universalistic standards rise above cultural and ideological differences and cannot be contradicted by local customs or treaties. In this respect, Article 53 Vienna Convention on the Law of Treaties specifies that a treaty is void “if, at time of its conclusion, it conflicts with a peremptory norm of general international law”.¹⁷¹ In addition, Article 64 stipulates that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm also becomes void and terminates”.¹⁷²

These norms are non-derogable rights, in the sense that these norms are fundamental and superior values within the international system. According to Andrea Bianchi, “[t]he inner moral aspiration of the law thus materialized in international law with the advent of *jus cogens*”.¹⁷³ Cezary Mik has pointed out that authors observed that ‘non derogation means that formal (*i.e.* through international agreements, unilateral acts, or resolutions of international organisations) or informal (*i.e.* through interpretation) rejection, amendment or partial derogation of a *ius cogens* norm is prohibited, as well as ascertaining customary law or general principles of law incompatible to these norms.’¹⁷⁴ This means that *ius cogens* norms are excluded from relativistic interpretations that would contradict these norms.

As De Schutter rightfully stressed, the concept of *ius cogens* is difficult given the fact that the list of the norms that can be qualified as *ius cogens* norms is still evolving. These norms are identified based on the evolution of thoughts and actions within the international community of states. It is observed that the emergence of

¹⁷⁰ Article 53 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/11/Add.2, 27 January 1980.

¹⁷¹ Article 53 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/11/Add.2, 27 January 1980.

¹⁷² Article 64 Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/11/Add.2, 27 January 1980.

¹⁷³ Andrea Bianchi, ‘Human Rights and the Magic of *Ius Cogens*’ (2008) 19 *The European Journal of International Law* 491, p. 495, referring to Lon L. Fuller, *The Morality of Law* (Revised edn, Yale University Press, New Haven 1965).

¹⁷⁴ Cezary Mik, ‘Jus Cogens in Contemporary International Law’ (2013) 33 *Polish Yearbook of International Law*, pp. 43-44.

custom is more important than the element of practice.¹⁷⁵ In identifying norms of *ius cogens*, Shaw noted the following:

The appropriate test would thus require universal acceptance of the proposition as a legal rule by States and recognition of it as a rule of *jus cogens* by an overwhelming majority of States, crossing ideological and political divides. It is also clear that only rules based on custom or treaties may form the foundation of *jus cogens* norms.

As De Schutter described it, there are doctrinal uncertainties on the criteria to recognise these norms. In addition, he argued that the criteria for recognising norms of *ius cogens* are sufficiently vague to adapt the list of human rights that should be recognised as such norms.¹⁷⁶ In addition, Bianchi observed that the way in which these norms come into being is of particular interest for debate,¹⁷⁷ while Shaw argued that *ius cogens* norms cannot be based upon ideas of a political or ideological minority.¹⁷⁸ He noted in this respect that Article 53 Vienna Convention on the Law of Treaties entails a two-stage approach:

First the establishment of the proposition as a rule of general international law, and secondly, the acceptance of that rule as a peremptory norm by the international community of States as a whole [...] The appropriate test would thus require universal acceptance of the proposition as a legal rule by States and recognition of it as a rule of *ius cogens* by an overwhelming majority of States, crossing ideological and political divides.¹⁷⁹

With respect to the notion that peremptory norms are part of general international law, Bianchi noted:

[I]t has been contended that their coming into being as general rules of international law would not occur through the medium of customary law-making and its reliance on state practice but rather by general principles. General principles would be established by a process similar, but not entirely analogous, to the one that leads to custom. In fact, the required general acceptance and recognition would not need to be based on state practice, as traditionally understood. It would rather result from a variety of manifestations ‘in which moral and humanitarian considerations find a

¹⁷⁵ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 64.

¹⁷⁶ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 66.

¹⁷⁷ Andrea Bianchi, ‘Human Rights and the Magic of Ius Cogens’ (2008) 19 *The European Journal of International Law* 491, p. 492.

¹⁷⁸ Malcolm N. Shaw, *International Law*, (6th edn, Cambridge University Press, Cambridge 2008), p. 126.

¹⁷⁹ Malcolm N. Shaw, *International Law*, (6th edn, Cambridge University Press, Cambridge 2008), p. 126-127.

more direct and spontaneous “expression in legal form”.¹⁸⁰

To date, there is no clear agreement on the list of *ius cogens* norms that are identified as such, although Bianchi noted that “[t]here is an almost intrinsic relationship between peremptory norms and human rights”.¹⁸¹ Mik noted in this regard that catalogues of peremptory norms have been proposed, but that this has led to unsatisfactory results and diverging lists.¹⁸²

Although there is no exhaustive list of *ius cogens* norms, consensus has been reached on certain norms of *ius cogens*. These norms include the prohibition of slavery and slave trade, racial discrimination, aggression and genocide.¹⁸³ Other norms include the prohibition of torture, cruel, inhuman or degrading punishment, arbitrary arrest and detainment, advocacy of national, racial or religious hatred, denial of freedom of thought, conscience and religion, the right to a fair trial and to be presumed innocent, the right to marry and the rights of minorities to enjoy their own culture.¹⁸⁴ Other peremptory norms are basic rules of international humanitarian law applicable in armed conflict and the right to self-determination of peoples.¹⁸⁵

According to De Schutter, it “remains controversial whether the emergence of peremptory norms could be regional, rather than universal and resulting from the international community as a whole”.¹⁸⁶ This possibility, however, cannot be excluded as other regional human rights systems have brought nuances in the list of these norms. For instance, in the European Court of Human Rights case of *Soering vs. United Kingdom*, Judge Meyer wrote in his concurring opinion on capital punishment and extraditing a person who could face the death penalty. Specifically, he noted that capital punishment “is not consistent with the present state of European civilization” and that extraditing a person who could face the death penalty “would be repugnant to European standards of justice, and contrary to the public order of Europe”.¹⁸⁷

Another example comes from the Inter-American Court of Human Rights in its

¹⁸⁰ Andrea Bianchi, ‘Human Rights and the Magic of Ius Cogens’ (2008) 19 *The European Journal of International Law* 491, p. 493.

¹⁸¹ Andrea Bianchi, ‘Human Rights and the Magic of Ius Cogens’ (2008) 19 *The European Journal of International Law* 491, p. 491.

¹⁸² Cezary Mik, ‘Jus Cogens in Contemporary International Law’ (2013) 33 *Polish Yearbook of International Law*, p. 58.

¹⁸³ International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment ICJ Reports 1971, p. 31.

¹⁸⁴ UN Human Rights Committee, General Comment 24 on ‘Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant’, 4 November 1994, CCPR/C/21/Rev./Add.6.

¹⁸⁵ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 65.

¹⁸⁶ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 65.

¹⁸⁷ European Court of Human Rights, *Soering v. The United Kingdom*, Application No. 14038/88, 7 July 1989, concurring opinion of judge Meyer.

judgment on *Juridical Condition and Rights of Undocumented Migrants*, on the status of the principle of equality and non-discrimination as a principle of *ius cogens*. The Court elaborated that “the principle of equality before the law, equal protection before the law and non-discrimination belongs to *ius cogens*, because the whole legal structure of national and international public order rests on it and it's a fundamental principle that permeates all laws. [...] At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *ius cogens*”.¹⁸⁸

With respect to the issue of whether the list of norms of *ius cogens* is broadened from a Southeast Asian, or an ASEAN perspective, remains to be seen. The ASEAN Human Rights Declaration does not specify which human rights are considered to be *ius cogens* norms and ASEAN's human rights system does not yet have a regional court on human rights. In addition, ASEAN currently has a modest overarching human rights commission whose authority still needs to develop (see Section 5.2 of Chapter V). Consequently, ASEAN's views on the list of norms of *ius cogens* are not yet clear.

Although it seems that regional differences can occur in theory (*i.e.* in the sense that certain rights or aspects thereof should be considered to be norms of *ius cogens* while this is not the case in other regions), the differences between the States will be minimal given the particular concept of *ius cogens*. This leads to the conclusion that norms of *ius cogens* on which international consensus is reached are norms of which ASEAN cannot derogate from, while they may add others or make nuances to the existing *ius cogens* norms in the future.

When unveiling the list from an ASEAN perspective, a starting point may be Indonesia's constitution, for example, which lists non-derogable rights, *i.e.*, the right to life, freedom from torture, thought and conscience, religion and enslavement, recognition as a person before the law, and the rights not to be tried under a law with retrospective effect (Article 28I(1)). The ASEAN Human Rights Declaration also forms a starting point, as it explicitly lists, but also omits, certain *ius cogens* norms. See Section 4 of Chapter V and the concluding chapter for a detailed analysis of the organisation's human rights declaration.

3.4 Vienna Conference: Catalyser for the debate

3.4.1 Asia's regional documents preceding the 1993 Vienna Conference

The 1993 Vienna World Conference on Human Rights can be considered as a catalyser for the debate on the universality of human rights and the relativistic viewpoints that were surfacing at that time. Asian perspectives were formulated in the preceding Bangkok Declarations, both from governments and NGOs. This subsection scrutinises these documents closer.

¹⁸⁸ Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on '*Juridical Condition and Rights of Undocumented Migrants*', 17 September 2003.

In 1989, the UN General Assembly called for a world meeting in which the progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights was to be reviewed and assessed. This resulted in the 1993 World Conference on Human Rights in Vienna. The agenda of the Conference was set by the 47th Session of the UN General Assembly in 1992, followed by four Preparatory Meetings. During the first Preparatory Meeting in September 1991, it already became clear that the issues on national sovereignty and universality were amongst others the most controversial ones.

In the run-up to the 1993 World Conference on Human Rights, representatives of States and NGOs discussed their views on human rights. In Asia, this led to two documents, which reveal diverging ideas. The States' representatives, who came together in the Regional Meeting for Asia of the World Conference on Human Rights in Bangkok in April 1993, formulated the 1993 Bangkok Declaration on Human Rights. NGOs in turn prepared their own 1993 Bangkok NGO Declaration on Human Rights. The governmental Bangkok Declaration is described as "a protest against a world order perceived as perpetuating injustices against developing countries: the practice of human rights was projected as an instrument of the West, selectively utilised to suit the West's purposes".¹⁸⁹

When scrutinising the different ideas in both Declarations, Muntarbhorn used angles in his research that provide a number of valuable insights. Specifically, he focused on the universality of human rights, the indivisibility of human rights, the notion of rights and duties, and the concept of Asian values, or in his words, values in Asia.¹⁹⁰

Muntarbhorn linked the universality of human rights to the primacy of international law, being applicable to all States as basic minimum standards.¹⁹¹ This is, however, in contrast to the then position of many States that human rights were still primarily part of the internal affairs of States. In this sense, they advocated State sovereignty and non-interference in the internal affairs of a State. When looking at the 1993 Bangkok Declaration, these views were indeed visible. Specifically, this Declaration covered a number of key values, which are to date still prevalent in the ASEAN region. Specifically, the Declaration mentioned respect for national sovereignty and national integrity and non-interference in the internal affairs of States.¹⁹² It also underlined the discouragement to attempt to use human rights as a conditionality for development assistance (para. 4), the right of States to

¹⁸⁹ Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration' (2013) 13 *Human Rights Law Review* 557, p. 579.

¹⁹⁰ See Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002).

¹⁹¹ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), p. 2.

¹⁹² Bangkok Declaration, para. 5. See UN World Conference on Human Rights, Final declaration of the regional meeting for Asia of the World Conference on Human Rights, 7 April 1993, A/CONF.157/ASRM/8, A/CONF.157/PC/59.

determine their own political systems (para. 6), and avoidance of double standards (para. 7).

Jau-Hwa Chen has noted that “the words ‘sovereignty’ and ‘interference’ have been notorious over the past 50 years, used by some Asian states as an excuse for no improvement in human rights”.¹⁹³ Nevertheless, these notions influenced the position that regional and national particularities should be upheld and that these practices should prevail over international human rights when they are in conflict. According to Muntarbhorn, these notions brought about the reluctance to accede to international human rights documents, or the accession on extensive reservations.¹⁹⁴ The current state of affairs of ratification of and accession to, as well as the reservations and declarations uttered by the ASEAN Member States, is analysed in Section 2 of Chapter III.

34 States and one national liberation movement (Palestine) attended the meetings that preceded the 1993 Bangkok Declaration. The observers comprised various observing States, specialised agencies, intergovernmental organisations such as ASEAN, United Nations organs, National Human Rights Institutions (including the Institution from the Philippines), United Nations human rights and related bodies, other organisations and non-governmental organisations. Regarding the participating States, all ASEAN Member States apart from Cambodia participated.

When examining the text of the 1993 Bangkok Declaration, it is striking that the preamble mentions the following, which corresponds to aspects of the ASEAN Way (analysed in Section 3 of Chapter IV):

Reaffirming the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of States,

Recognizing that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values.¹⁹⁵

Regarding the latter consideration, Attilio Pisanò rightly questioned “who is entitled to decide which of the values underlying human rights are ‘incompatible’ with Asian values and which are “compatible””.¹⁹⁶ This is indeed one of the points of

¹⁹³ Jau-Hwa Chen, ‘Asia Values? Why Not? But How?’, in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Palgrave Macmillan, New York 2008), p. 50.

¹⁹⁴ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), p. 3.

¹⁹⁵ Bangkok Declaration, preamble. See UN World Conference on Human Rights, Final declaration of the regional meeting for Asia of the World Conference on Human Rights, A/CONF.157/ASRM/8, A/CONF.157/PC/59, 7 April 1993.

¹⁹⁶ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 394.

critique uttered with respect to the Asian values debate, which is analysed in Section 2 of Chapter V.

In addition, the aforementioned positions formulated in the preamble are especially visible in Section 5 and 8 of this Declaration. They read as follows:

5. Emphasize the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure;

8. Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

In contrast, the 1993 Bangkok NGO Declaration on Human Rights opted for an alternative approach, that is to say promoting the primacy of international human rights standards over regional and national particularities.

It is questioned, however, to what extent this Declaration is representative for the region. Brems noted that the 240 representatives of 110 NGO's who formulated the Bangkok NGO Declaration may not represent their society as they may be more than average be influenced by the West. Nevertheless, the comparison of both document can be "instructive."¹⁹⁷

When reading the Bangkok NGO Declaration, the viewpoints on the universality of human rights are visible in the following sections:

Universality. We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for human rights. There is emerging a new understanding of universalism encompassing the richness and wisdom of the Asia-Pacific cultures.

Universal human rights are rooted in many cultures. We affirm the basis of the universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.

As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.¹⁹⁸

¹⁹⁷ Eva Brems, *Human Rights: Universality and Diversity*, (Martinus Nijhoff Publishers, The Hague 2001), p. 70.

¹⁹⁸ UN World Conference on Human Rights, *Bangkok NGO Declaration on Human Rights*, adopted on 27 March 1993, UN Doc. A/CONF.157/PC/83, 19 April 1993.

In contrast to the views formulated in the Bangkok Declaration formulated by governments, in the Bangkok NGO Declaration it was asserted that the universality of human rights prevails over cultural practices in case they derogate from universally accepted human rights.

While the universality of human rights is underscored, Peter Baehr has provided an insightful nuance when he observed that within NGOs differences were visible with respect to the universality of human rights. Specifically, he referred to the example of Amnesty International and the question whether the organisation should focus on the release of persons who were imprisoned because of their sexuality. In Asian (but also African and Latin-American) countries, sections of this organisation were against this position, because they considered homosexuality to be an illness that had nothing to do with human rights.¹⁹⁹

The second angle adopted by Muntarbhorn relates to the indivisibility of human rights, which he observed not all Asian States accepted, or that some felt uncomfortable with this notion.²⁰⁰ In contrast, the view of NGO's in their Declaration was as follows:

2. Indivisibility. We affirm our commitment to the principle of indivisibility and interdependence of human rights, be they civil, political, economic, social or cultural rights. The protection of human rights concerns both individuals and collectivities. The enjoyment of human rights implies a degree of social responsibility to the community (...)

Violations of civil, political and economic rights frequently result from the emphasis on economic development at the expense of human rights. Violations of social and cultural rights are often the result of political systems which treat human rights as being of secondary importance. (...)

[Economic rights] can only be protected where people are able to exercise their civil and political rights (...) Poverty arises from maldevelopment in the face of systemic denial of human rights.

There must be a holistic and integrated approach to human rights. One set of rights cannot be used to bargain for another.²⁰¹

On other occasions, governments and NGOs also adopted diverging views. Illustrative is the difference in perception with respect to rights and duties. Muntarbhorn noted that less liberal governments tend to advocate human duties or responsibilities towards the State and other persons over the need to respect human rights. NGOs adopted a contrasting view in their 1998 Universal Declaration on the

¹⁹⁹ Peter R. Baehr, *Human Rights: Universality in Practice* (Palgrave Macmillan Press 1999), p. 12.

²⁰⁰ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), p. 5.

²⁰¹ UN World Conference on Human Rights, *Bangkok NGO Declaration on Human Rights*, adopted on 27 March 1993, UN Doc. A/CONF.157/PC/83, 19 April 1993, Article 2.

Duties of Governments and Other Power Groups, in which the following was stated:

Article 1. All governments and other power groups, particularly non-government armed groups and business enterprises, are under a duty to guarantee that all human beings are born free and equal in dignity and rights.

Article 2. All governments and other power groups are obliged to promote and protect all rights and freedoms set forth in the Universal Declaration on Human Rights and other relevant instruments, without distinction of any kind, such as race, colour, gender, sexual orientation, language, religion, political or other opinion, national, social, or cultural origin, property, birth or other status.²⁰²

On the concept of Asian values, or values in Asia, Muntarbhorn summarised the concept as the idea that the interests of the family and community and the decision-making power of governments or States take precedence over individual interests. By implication, he noted that human rights of the individual are subordinate to the collective interest.²⁰³ Muntarbhorn's question of 'who is making the argument?' is relevant, as governments and NGOs have diverging views. The Asian values debate is researched in more detail in Section 2 of Chapter V.

Based on the aforementioned, one can conclude that both declarations were a reflection of the different viewpoints and interests of States and civil society at that time. While governments emphasised human rights to be primarily part of the internal affairs of a State, respect for national sovereignty and national integrity and non-interference in the internal affairs of States, NGOs promoted (at least at the abstract level) the primacy of international human rights standards over regional and national particularities and the universality of human rights. NGOs also focused more on the indivisibility of human rights, as well as on human *rights* instead of the duties an individual has. This difference in focus might be explained by Muntarbhorn's fourth angle, Asian values. In dealing with his question 'who is making the argument?', he stated that Asian values, present among less liberal circles or authoritarian governments or regimes, implied that the interests of the State were more important than the interests of its individuals. Other values in Asia, such as compassion, non-violence and respect for other human beings and the natural environment, were not included by these States.²⁰⁴

²⁰² Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), p. 7.

²⁰³ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), pp. 7-8.

²⁰⁴ Vitit Muntarbhorn, *Dimensions of Human Rights in the Asia-Pacific Region* (Office of the National Human Rights Commission of Thailand, Bangkok 2002), p. 8.

3.4.2 The 1993 Vienna Conference and Programme of Action

The final document following from the World Conference on Human Rights was adopted by representatives of 171 States on 25 June 1993 on the basis of consensus. The Vienna Declaration and Programme of Action was endorsed by the 48th Session of the UN General Assembly.²⁰⁵ According to the United Nations, the Vienna Declaration and Program of Action marked the culmination of a long process of review and debate over the then current status of the human rights machinery in the world.²⁰⁶

In the final document, “the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law”²⁰⁷ was reaffirmed. They also upheld the notion that “the universal nature of these rights and freedoms is beyond question”.²⁰⁸ In addition, the key role for regional arrangements in the promotion and protection of human rights was emphasised:

Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities.

The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.²⁰⁹

The Vienna Declaration also emphasised regional and sub-regional arrangements for the promotion and protection of human rights (para. 77). Regarding the universality and the indivisibility of human rights and the notions of State sovereignty and non-interference, the following compromise was reached:

²⁰⁵ UN General Assembly Resolution 48/121 (*World Conference on Human Rights*) UN Doc. A/Res/48/121, 20 December 1993.

²⁰⁶ UN General Assembly Resolution 48/121 (*World Conference on Human Rights*) UN Doc. A/Res/48/121, 20 December 1993.

²⁰⁷ UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, Art. I.1.

²⁰⁸ UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, Art. I.1.

²⁰⁹ UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, Art. I.37.

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

According to Koskinen, the Vienna Declaration adopted an anti-relativist position because of the inclusion of the following phrase:

The universal nature of these rights and freedoms is beyond question...human rights and fundamental freedoms are at the birth right of all people”.²¹⁰

Koskinen argued:

From this perspective it seems that because human rights instruments have been negotiated, affirmed, and ratified so often and by so many states, they do in fact constitute the expression of a universal agreement.²¹¹

This observation does not provide the complete picture, as the Vienna Declaration also includes relativistic arguments that were brought forward in the debate. Indeed, the Declaration refers to national and regional particularities, as well as cultural, religious and historic backgrounds. Bearing this in mind, a clear compromise has been reached and is visible in the document. This was linked with what Donnelly then called “weak cultural relativism”.²¹² Koskinen summarised this approach as follows:

When human rights and various cultural traditional practices enter into conflict, the traditions give way to human rights norms. This entails that human rights allow space for culturally and socially sensitive variations in the implementation of the rights. The idea behind this approach is that states themselves decide on the laws, institutions, and procedures they choose to undertake to implement the rights and therefore it is evident that states’ value systems, cultures, histories, and politics as well as resources will affect them. In other words, in this approach the core concepts of rights derived from human rights documents are authoritative, but they are subject

²¹⁰ UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, UN Doc. A/CONF.157/23, 12 July 1993, para 1. Quoted by Päivi Koskinen, “Asian Values”, Gender, and Culture Specific Development’ in Leena Avonius and Damien Kingsbury, *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Pallgrave Macmillan New York 2008), p. 162.

²¹¹ Päivi Koskinen, “Asian Values”, Gender, and Culture Specific Development’ in Leena Avonius and Damien Kingsbury, *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Pallgrave Macmillan New York 2008), p. 162.

²¹² Päivi Koskinen, “Asian Values”, Gender, and Culture Specific Development’ in Leena Avonius and Damien Kingsbury, *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Pallgrave Macmillan New York 2008), p. 163.

to differing interpretations and manners of implementation. This approach is termed “weak” relativism because it does not involve questioning the universal nature of rights, but it does imply an acceptance that the concrete implementation can be dependent on cultural factors.²¹³

Striking is Chien-Huei Wu’s reflection when comparing the governmental Bangkok Declaration and the Vienna Declaration, as he observed:

By reading the relevant passages of the Bangkok Declaration and the VDPA [Vienna Declaration and Programme of Action], it becomes clear that different weight is placed on the “while” clauses: the Bangkok Declaration focuses on regional particularities, but the VDPA on the universality of human rights. It can thus be said that the VDPA endorses the universality of human rights, while taking into account the regional particularities.²¹⁴

This is in line with Catherine Shanahan Renshaw’s observation, who stated:

After tortuous negotiation during the Vienna World Conference, in the Vienna Declaration, the qualifying ‘while’ was placed in relation to the claim for particularism, rather than the claim for universalism. The effect of Article 5 of the Vienna Declaration is that regardless of historical, cultural backgrounds (which can be borne in mind) it is the State’s duty to promote and protect all human rights and fundamental freedoms.²¹⁵

While Donnelly nowadays speaks of the relative universality of human rights, rather than weak (cultural) relativism, the observations made by Wu and Renshaw appear to correspond to Donnelly’s relative universality of human rights, which captures the idea of the Vienna conference. In particular, national and regional particularities, as well as cultural, religious and historic backgrounds are borne in mind in light of the universality of human rights.

3.4.3 ASEAN after the 1993 Vienna Conference

The Vienna Declaration and Programme of Action called for additional facilities for the UN Centre for Human Rights and the establishment of a UN High

²¹³ Päivi Koskinen, “‘Asian Values’, Gender, and Culture Specific Development’ in Leena Avonius and Damien Kingsbury, *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Pallgrave Macmillan New York 2008), p. 163.

²¹⁴ Chien-Huei Wu, ‘Human Rights in ASEAN Context: Between Universalism and Relativism’ in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 4. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

²¹⁵ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557, p. 259.

Commissioner for Human Rights, which was established in 1994.²¹⁶ In addition, the Vienna Declaration called for possible sub-regional arrangements for the protection and promotion of human rights.

ASEAN's illustrative reaction is the position brought forward in the Joint Communiqué of the 24th ASEAN Ministerial Meeting, again arguing from the perspective of safeguarding the national sovereignty:

15. The Foreign Ministers exchanged views on the issue of human rights and noted with concern its tendentious application in inter-state relations. They agreed that while human rights is universal in character, implementation in the national context should remain within the competence and responsibility of each country, having regarded the complex variety of economic, social and cultural realities. They emphasized that the international application of human rights should neither be narrow and selective nor should it violate the sovereignty of nations.²¹⁷

From this follows that, in their view at that time, even a regional arrangement might go too far. Indications for this position might be read in the comment of Singapore's Foreign Minister who already underscored at the World Conference on Human Rights that "[u]niversal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity. The gap between the different points of view will not be bridged if this is ignored. We deceive only ourselves if we pretend this is not so".²¹⁸

During the 26th ASEAN Ministerial Meeting (Singapore, July 1993) the Foreign Ministers commented the following on human rights, which can be read best in its original wordings:

16. The Foreign Ministers welcomed the international consensus achieved during the World Conference on Human Rights in Vienna, 14-25 June 1993, and reaffirmed ASEAN's commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993. They stressed that human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances. They emphasized that the promotion and protection of human rights should not be politicized.

²¹⁶ General Assembly Resolution 48/141, High Commissioner for the Promotion and Protection of all Human Rights, UN Doc. A/Res/48/141, 20 December 1993.

²¹⁷ ASEAN Ministerial Meeting, *Joint Communiqué of the 24th ASEAN Ministerial Meeting*, Kuala Lumpur, 19-20 July 1991, available at <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1991-24th-AMMJC.pdf>> last accessed 10 September 2018.

²¹⁸ Statement by Foreign Minister Wong Kan Seng of Singapore at the Vienna Conference on Human Rights, 16 June 1993, cited by Fried van Hoof, 'Asian Challenges to the Concept of Universality: Afterthoughts on the Vienna Conference on Human Rights' in Jacqueline Smith (ed), *Human Rights: Chinese and Dutch Perspectives* (Kluwer Law international, The Hague 1996), p. 8.

17. The Foreign Ministers agreed that ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights. They noted that the UN Charter had placed the question of universal observance and promotion of human rights within the context of international cooperation. They stressed that development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights. They emphasized that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states. They were convinced that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights.

18. The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.²¹⁹

After thus having emphasised their views of human rights, including their commitment to and respect for human rights, the interrelatedness and indivisibility of all human rights and the right to development, the ASEAN States agreed that ASEAN should coordinate a common approach on human rights. While the ASEAN Member States were initially reluctant to consider a regional arrangement on human rights, it would appear that the 1993 Vienna Declaration formed a source of inspiration for ASEAN. Specifically, while “national sovereignty, territorial integrity and non-interference in the internal affairs of states” are elements of the ASEAN Way, it was underscored that they should consider the establishment of an appropriate regional mechanism on human rights. Chapter III will deal with the ASEAN Way, and Chapter IV will provide for a detailed analysis of ASEAN’s regional human rights system.

²¹⁹ ASEAN Ministerial Meeting, *Joint Communiqué of the 26th ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993, <http://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993>, last accessed 10 September 2018.

4 CONCLUSION

International human rights law has evolved gradually over time, hereby also anchoring human rights at the international level instead of at the level of nation states alone. With this development, the notion of the universality of human rights and norms of *ius cogens* as obligatory norms for the international community as a whole grew gradually.

This chapter has shown that the universality of human rights has different meanings, whereby the question arises to what extent current international human rights law allows for particularities or relativistic variations.

The debate on the universality on human rights is captured in the ideas on universalism and relativism, which were initially brought as each other's extremes on a sliding scale. In addition, whilst weak cultural relativism (or strong universalism) was considered as a common ground between extreme forms of universalism and relativism, universalism and relativism could instead be considered within a multiple space. This does justice to the different notions of universality and relativity. In line with this, Donnelly argued for the 'relative universality of human rights' and his three-level scheme on 'concepts', 'conceptions' and 'implementation'.

His theory corresponds to the notion that regional and national particularities should be borne in mind when protecting and promoting human rights, whilst also upholding the universality of human rights. As the importance of regional and national particularities is underscored by ASEAN time and again – but also in other regions – his theory has been used in and developed further in the present research. From the Vienna Conference and Programme of Action it also follows that this combination of universality and relativity is not necessarily contradictory. Universal human rights are in other words at the same time relative. The focus hereby lies on the relative *universality* of human rights, or in other words that the room for and debate on relativistic positions takes place within the framework of the claim to the universality of human rights. Regional and national particularities are thus limited in the sense that they cannot detract from the universality of human rights. A balance must be struck when protecting and promoting internationally recognised human rights standards while bearing in mind the regional and national particularities. The exact content and nature of this balancing act in the context of ASEAN is elaborated on in the following chapters.

CHAPTER III

HUMAN RIGHTS LAW IN ASEAN MEMBER STATES: TREATIES, CONSTITUTIONS AND HUMAN RIGHTS INSTITUTES

1 INTRODUCTION

Although ASEAN adopted a number of instruments in which human rights are addressed prior to the ASEAN Charter, the inclusion of human rights received an impetus with this Charter. Specifically, the Charter led to the establishment of the ASEAN Intergovernmental Commission on Human Rights and the adoption of the ASEAN Human Rights Declaration. Alongside the ASEAN Intergovernmental Commission on Human Rights as the organisation's overarching human rights body, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers were also established.

As explained before, a regional human rights system such as that of ASEAN and the interpretation of its codified human rights depend on each individual Member State and the consensus reached among these States. Member States also determine the possibilities in the further development of such a system. Within ASEAN, this is especially the case because of the so-called ASEAN Way (analysed in the following chapter). This is furthermore influenced by the lack of an independent regional human rights court or body with interpretative authority. In this chapter, the existing human rights systems in the ASEAN Member States are therefore researched.

With respect to the international level, the ASEAN Member States are to a varying degree State Parties to the core UN human rights covenants. The signing, ratification of and accession to these human rights instruments by these States are mapped. In this way, insight is given into the position of ASEAN Member States to international human rights standards.

In addition, an analysis of the constitutions of each Member State illustrates what has been at least formally endorsed in the legal domain of the ASEAN Member States with respect to human rights.

Before discussing each constitution, awareness of the following aspects is relevant. Firstly, colonial times influenced the development of constitutional law. For example, it is noted that the Malaysian Constitution was mirrored on the constitutional principles of the United Kingdom and India after Malaysia became independent.¹ Regarding the negotiations on Indonesia's Constitution between Indonesia and the Netherlands, Droogleever wrote a detailed account.² After the French protectorate treaty of 11 August 1863 and the entry of France in Cambodia, Cambodia had a written constitution for the first time.³ On the other hand, it was left to these States to make adjustments to these constitutions after their independence, in case they felt that Western influences were too great or their own too small. In fact, a number of the constitutions were revised at a later date, allowing these States to include their own nuances to human rights as an independent State that might be not be visible in Western constitutions.

This overview of the uptake of human rights by the ASEAN Member States is intended to unveil the formal common ground with respect to human rights based on the constitutions of each ASEAN Member State and the core UN human rights conventions to which they are party. Based on this analysis, it can be determined whether the laws of the ASEAN Member States are – at least on paper – in conformity with internationally recognised human rights standards. This can also assist to explain the consensus reached at ASEAN level, it provides an indication for the way in which human rights are interpreted in ASEAN's human rights system and the possibilities and boundaries for the further development of this system, as well as whether ASEAN's human rights system builds upon or detracts from the claim to the universality of human rights.

2 THE STATUS OF CORE UN HUMAN RIGHTS CONVENTIONS IN THE ASEAN MEMBER STATES

2.1 Ratifications, accessions, interpretative declarations and reservations of the ASEAN Member States

ASEAN's efforts in developing a regional human rights system could form a bridge between international human rights law and the protection of fundamental rights at the domestic level. This section examines the signing and ratification of and accession to UN human rights treaties by the ASEAN Member States. The

¹ Mohd Rizal Mohd Yaakop, Ainul Adzellie Hasnul and Norman Suratman, 'Malaysia's Constitutional Democracy' (2016) 3 (5) *International Journal of Research in Humanities and Social Studies* 17, p. 17 and Asmida bt Ahmad, Fork Yow Leong and Paul Linus Andrews, *Legal Systems in ASEAN. Malaysia*, (ASEAN Law Association, Singapore 2004), p. 14.

² Pieter J. Droogleever, 'The genesis of the Indonesian constitution of 1949' (1997) 153 *Bijdragen tot de Taal-, Land- en Volkenkunde* 65.

³ Vandeluxe Yan, 'The historical development of Cambodia's constitutions' in Peng Hor, Phallack Kong and Jörg Menzel (eds), *Cambodian Constitutional Law*, (Konrad-Adenauer-Stiftung, Cambodia 2016), p. 56.

interpretative declarations and reservations that are formulated by these States are included in the analysis as they provide an insight in these States' individual perceptions of, or relativistic notions on, human rights, which, in turn, affects ASEAN's human rights system. The ratifications by the Member States are summarised in the table in Annex 1.

While a high number of ratifications of a treaty implies a certain common ground among the Member States, the interpretative declarations and reservations unveil relativistic notions of and differentiations between these States. Together with the examination of the constitutions in the next section, this analysis provides insight into which States are taking the lead in the recognition of human rights (– at least the formal recognition thereof –), which Member States are lagging behind, the common ground amongst these States, and the question whether the ASEAN Member States are building upon or detracting from international human rights standards.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1969)⁴

Cambodia, Indonesia, Laos, the Philippines, Singapore, Thailand and Vietnam have ratified the ICERD. Four of those countries to have ratified the instrument have issued declarations and reservations. These four ratifying States have made a reservation to Article 22 on the dispute settlement of the International Court of Justice (ICJ).

Regarding the possibility to make a declaration recognising the Committee on the Elimination of Racial Discrimination in accordance with Article 14 ICERD,⁵ none of the ASEAN Member States made such a declaration.

Indonesia

Indonesia does not consider itself to be bound by Article 22 and is of the opinion that dispute settlement by the ICJ is only possible with the consent of all the parties to the dispute.

Singapore

Singapore made reservations and declarations to Articles 2, 6 and 22. The reservations and declarations deal with issues on applying policies on the admission and regulation of foreign work-pass holders with promoting and maintaining

⁴ International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19, United Nations, *Treaty Series*, Vol. 660, p. 195.

⁵ Article 14(1) stipulates the following: A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

cohesion in its racially diverse society, the obligation under Article 2(1)(d) which may be implemented by means other than legislation, and the circumstance that reparation or satisfaction in Article 6 is fulfilled when one or other of these forms of redress is made available and that ‘satisfaction’ in this article includes “any form of redress effective to bring the discriminatory conduct to an end”.⁶ On Article 22, Singapore states that its consent is necessary for dispute settlement by the ICJ.

Thailand

In its interpretative declaration, Thailand stated that it does not interpret and apply the Convention as imposing obligations beyond the confines of the State’s Constitution and laws. Such interpretations and applications are furthermore limited to or consistent with the obligations under other international human rights instruments to which Thailand is party. Thailand also made a reservation to Article 22, to which it considers itself not to be bound.

The State withdrew its reservation on its interpretation of Article 4 in 2016, which required a State Party “to adopt measures in the fields covered by subparagraphs (a), (b) and (c) of that article only where it is considered that the need arises to enact such legislation”.⁷

Vietnam

With respect to Articles 17(1) and 18(1) Vietnam declared that the Convention should be open to participation by all States in accordance with the principle of sovereign equality of States. A reservation is also made to Article 22, by which the State does not consider itself to be bound. It also states that all parties to the dispute should consent to dispute settlement by the ICJ.

In line with the objections made by France, Germany, Romania, Sweden and the United Kingdom, one could argue that it is unclear which changes Thailand intends to introduce under the Convention, as the Convention is subjected to Thailand’s Constitution and legislation. Although it is formulated as a declaration, it is more of a general reservation. The provisions of the ICERD could become ineffective, making the reservation incompatible with the object and purpose of the Convention.

⁶ Reservations and declarations made by Singapore upon signature and confirmed upon succession, United Nations Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en>, last accessed 11 September 2018.

⁷ United Nations Treaty Collection, International Convention on the Elimination of All Forms of Racial Discrimination, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#14>, last accessed 11 September 2018.

International Covenant on Civil and Political Rights (ICCPR, 1976)⁸

Cambodia, Indonesia, Laos, the Philippines, Thailand and Vietnam are party to the ICCPR. They constitute only a slight majority, despite the fact that this Convention is considered to be part of the International Bill of Human Rights. Of these State Parties, only Cambodia has not formulated a declaration or reservation.

Regarding Article 41 ICCPR, the Philippines is the only ASEAN Member State that recognises the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another party is not fulfilling its obligations.

With respect to the Optional Protocol on the competence of the Committee to receive and consider communications from individuals, the Philippines is the only State to have ratified this instrument, whilst Cambodia has signed this instrument.⁹ The Second Optional Protocol aiming at the abolition of the death penalty has also only been ratified by the Philippines.¹⁰

Indonesia

Indonesia made a declaration on the right to self-determination, in the sense that it does not apply to “a section of people within a sovereign independent state and can not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states”.¹¹

Laos

Laos made a reservation on Article 22 on the freedom of association, as this article “shall be so applied as to be in conformity with the Constitution and the relevant laws of the Lao People’s Democratic Republic”.¹² The State also declared that the

⁸ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, United Nations, *Treaty Series*, Vol. 999, p. 171 and Vol. 1057, p. 407 (procès-verbal of rectification of the authentic Spanish text); depositary notification C.N.782.2001.TREATIES-6 of 5 October 2001 [Proposal of correction to the original of the Covenant (Chinese authentic text)] and C.N.8.2002.TREATIES-1 of 3 January 2002 [Rectification of the original of the Covenant (Chinese authentic text)].

⁹ United Nations Treaty Collection, Optional Protocol to the International Covenant on Civil and Political Rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en> (last accessed 30 October 20018).

¹⁰ United Nations Treaty Collection, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV12&chapter=4&clang=_en> (last accessed 30 October 2018).

¹¹ Declaration made by Indonesia, United Nations Treaty Collections, International Covenant on Civil and Political rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>, last accessed 11 September 2018.

¹² Reservation made by Laos, United Nations Treaty Collections, International Covenant on Civil and Political rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>, last accessed 11 September 2018.

right to self-determination shall be interpreted as being compatible with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations and the Vienna Declaration and Programme of Action. Laos furthermore declared that Article 18 “shall not be construed as authorizing or encouraging any activities, including economic means, by anyone which directly or indirectly, coerce or compel an individual to believe or not to believe in a religion or to convert his or her religion or belief. (...) All acts creating division and discrimination among ethnic groups and among religions are incompatible with Article 18 (freedom of thought, conscience and religion) of the Covenant”.¹³

Thailand

Thailand also formulated an interpretative declaration on the right to self-determination, as this “shall be interpreted as being compatible with that expressed in the Vienna Declaration and Programme of Action”.¹⁴ Furthermore ‘war’ in Article 20 on the prohibition of war propaganda is understood as war in contravention of international law.

Thailand withdrew its declarations on Article 6(5) and 9(3) ICCPR in 2012. These articles deal with death sentences, custody and trial of arrested or detained persons.

On 8 July 2014, Thailand exercised its right of derogation under Article 4(1) ICCPR, specifically its obligations under Article 12(1) on the freedom of movement and residence, Article 14(5) on the right to appeal in criminal cases, Article 19 on the freedom of expression and information and Article 21 on the right of peaceful assembly. Thailand hereby stressed that the non-derogable rights as included in Articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18 of the Covenant have not been affected (right to life, prohibition of torture or cruel, inhuman or degrading treatment or punishment, prohibition of slavery, slave-trade and servitude, prohibition of detention on account of the inability to fulfil a contractual obligation, the principle of *nulla poena sine praevia lege poenali*, recognition as a person before the law and freedom of thought, conscience and religion).

Vietnam

Vietnam made a declaration on Article 48(1) on signing the Convention, namely that the Convention should be open to participation by all States in accordance with the principle of sovereign equality of States.

¹³ Declaration made by Laos, United Nations Treaty Collections, International Covenant on Civil and Political rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>, last accessed 11 September 2018.

¹⁴ Interpretative declaration made by Thailand, United Nations Treaty Collections, International Covenant on Civil and Political rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>, last accessed 11 September 2018.

The reservation of Laos to Article 22 of the Convention caused a number of objections of other State Parties. In line with the objections of Austria, Finland, Ireland, the Netherlands, the United Kingdom and Sweden, the observation can be made that the general reference to the national Constitution does not make clear to what extent the State has accepted the article. It is rightly observed that with such a general reference to the State's constitution or domestic laws, the extent of derogation is unclear and may cast doubts as to the State's commitment to fulfil its obligations.

International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976)¹⁵
Cambodia, Indonesia, Laos, Myanmar, the Philippines, Thailand and Vietnam are party to the ICESCR. The same observation can be made as formulated on the ICCPR, namely that only a slight majority of the ASEAN Member States are party to this Convention even though it is considered to be part of the International Bill of Human Rights.

The Optional Protocol regarding the competence of the Committee on Economic, Social and Cultural Rights to receive and consider communications (on behalf) of individuals or groups of individuals, has neither been signed nor ratified by any of the ASEAN Member States.¹⁶

Indonesia

Indonesia made a declaration on the right to self-determination, by stating that “this article does not apply to a section of people within a sovereign independent state and can not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states”.¹⁷

Myanmar:

Myanmar formulated the declaration that the right to self-determination “does not apply to any section of people within a sovereign independent state and cannot be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of a sovereign and

¹⁵ International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with Article 27, United Nations, *Treaty Series*, Vol. 993, p. 3; depositary notification C.N.781.2001.TREATIES-6 of 5 October 2001 [Proposal of correction to the original of the Covenant (Chinese authentic text) and C.N.7.2002.TREATIES-1 of 3 January 2002 [Rectification of the original of the Covenant (Chinese authentic text)].

¹⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3-a&chapter=4&clang=_en> (last accessed 30 October 2018).

¹⁷ Declaration made by Indonesia, United Nations Treaty Collections, International Covenant on Economic, Social and Cultural Rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV3&chapter=4&clang=_en>, last accessed 11 September 2018.

independent state”.¹⁸ In addition, it was declared that it shall not be applied to undermine Section 10 of its national constitution which deals with the prohibition to secede from Myanmar.

Thailand

Thailand’s interpretative declaration also deals with the right to self-determination, as the term shall be interpreted as being compatible with that expressed during the Vienna Declaration and Programme of Action.

Vietnam

Vietnam declared on Article 26(1) (regarding signing the document) that the Convention should be open to participation by all States in accordance with the principle of sovereign equality of States.

Indonesia and Thailand reiterated their declarations on the right to self-determination that were made with respect to the ICCPR. The declaration of Myanmar was objected by Austria, Finland, Germany, Ireland, Latvia, the Netherlands, Portugal and Sweden. These States consider that the declaration of Myanmar constitutes a reservation which has a general and indefinite scope. It subjects the Covenant to national law instead of international law, making it incompatible with the object and purpose of the Convention. In addition, Austria interprets the right to self-determination differently than Myanmar, whereas Germany and Portugal objected to Myanmar’s interpretation. Moreover, Sweden argued that “[t]he declaration concerning Article 1 places conditions on the exercise of the right of peoples to self-determination not provided for in international law. To attach such conditions could undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character.”¹⁹

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1981)²⁰

By 2006, CEDAW had been ratified by all ASEAN Member States. This implies a certain common ground among them, although seven of these States formulated declarations and reservations that gave room for national influences and that subjected international standards to the national level.

¹⁸ Declaration made by Myanmar, United Nations Treaty Collections, International Covenant on Economic, Social and Cultural Rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&clang=_en#EndDec> (last accessed 30 October 2018).

¹⁹ Formulated by Sweden, United Nations Treaty Collections, International Covenant on Economic, Social and Cultural Rights, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&clang=_en> (last accessed 30 October 2018).

²⁰ Convention on the Elimination of All Forms of Discrimination against Women, adopted with Resolution 34/180, *Official Records of the General Assembly of the United Nations, Thirty-fourth Session, Supplement No. 46 (A/34/46)*, p. 193, United Nations, *Treaty Series*, Vol. 1249, p. 13.

CEDAW's Optional Protocol is signed by Indonesia, the State Parties are Cambodia, the Philippines and Thailand.

Brunei Darussalam

Brunei Darussalam expressed its reservations “regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam”²¹ and to Articles 9(2) on equality regarding the nationality of one's children, and Article 29(1) on arbitration and dispute settlement by the ICJ.

Indonesia

Indonesia does not consider itself to be bound by Article 29(1) CEDAW and is of the opinion that a dispute on the Convention's interpretation or application may only submitted to arbitration or the ICJ when all parties to the dispute agree.

Malaysia

Malaysia declared that its accession is subject to the understanding that the provisions do not conflict with the provisions of Islamic Sharia law and its Federal Constitution. In addition, Malaysia does not consider itself to be bound by Articles 9(2), 16(1)(a), 16(1)(c), 16(1)(f) and 16(1)(g), which deal with equality regarding the nationality of one's children, marriage and family life. Article 11 on employment is interpreted “as a reference to the prohibition of discrimination on the basis of equality between men and women only”.²²

Malaysia withdrew its reservation to Article 2(f), which constitutes the State's obligation to “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.²³ It has also withdrawn its reservations on Article 9(1) on equality regarding nationality and Article 16(1)(b), 16(1)(d), 16(1)(e) and 16(1)(h) on certain issues with respect to marriage and family life. On the other hand, Malaysia also declared Sharia law to be applicable to Article 5(a) on sex role stereotyping and prejudice, Article 7(b) dealing with political and public life, and Article 16(1)(a) and (2) on marriage and family life at the same time it withdrew these reservations in 1998. Article 9(2) on equality regarding the nationality of one's children, Malaysia stated that the reservation would be reviewed if Malaysia

²¹ Reservation made by Brunei Darussalam, United Nations Treaty Collections, Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

²² Declaration made by Malaysia, United Nations Treaty Collections, Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

²³ Withdrawn by Malaysia, United Nations Treaty Collections, Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

amends the relevant law. In 2010, the reservations on Articles 5(a), 7(b) and 16(2) were withdrawn.

Myanmar

Myanmar made a reservation on Article 29 on arbitration and dispute settlement by the ICJ, to which this State does not consider itself to be bound.

Singapore

Singapore made a number of reservations. It reserved the right not to apply the provisions of Article 2(a) to (f) on policy measures to eliminate discrimination, and Article 16(1)(a), 16(1)(c), 16(1)(h) and 16(2) on marriage and family relationships, where compliance with these provisions would be contrary to minorities' religious or personal laws. It also considered legislation in respect of Article 11 on employment "unnecessary for the minority of women who do not fall within the ambit of Singapore's employment legislation".²⁴ It also does not consider itself to be bound by Article 29(1) regarding arbitration and dispute settlement by the ICJ.

Singapore withdrew a number of its reservations in 2007, which focused on the entry into, stay in, employment and departure from Singapore, citizenship of women who became citizens based on marriage and children who were born outside Singapore. It also partially withdrew its reservations on Articles 2 and 16 CEDAW in 2011. Instead of making a reservation to these articles as a whole, Singapore now reserves the right not to apply Article 2(a) to (f), and Article 16(1)(a), 16(1)(c), 16(1)(h) and Article 16(2). In 2015, Singapore partially withdrew its reservation on Article 11, which resulted in the current reservation on Article 11.

Thailand

Thailand formulated a declaration on the purpose of the Convention, namely to "eliminate discrimination against women and to accord to every person, men and women alike, equality before the law, and are in accordance with the principles prescribed by the Constitution of the Kingdom of Thailand."²⁵ Like other States, Thailand does not consider itself to be bound by Article 29(1).

Thailand withdrew its reservations that gave primacy to national law, regulations and practices in different phases in the 1990s and 2012. These reservations were initially made with respect to Articles 7, 9(2), 10, and 16, which deal with political and public life, nationality of one's children, education, marriage and family life.

²⁴ Reservation made by Singapore, United Nations Treaty Collections, Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

²⁵ Declaration made by Thailand, United Nations Treaty Collections, Convention on the Elimination of All Forms of Discrimination against Women, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

Vietnam

Vietnam also does not consider itself to be bound by Article 29 (1) CEDAW.

Declarations and reservations are formulated that provide room for national influences and that subject international standards to national legislation. Such declarations and reservations detract from international human rights standards. A number of these reservations have later been withdrawn.

Objections were made to the reservations of Brunei Darussalam by a significant number of States, namely Austria, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and the United Kingdom. These States formulated objections, which in essence relate to the observation that Brunei Darussalam's reservations to the specific articles would result in discrimination based on sex. It was argued that the general reservations do not specify their extent and raise doubts on this State's commitment to the object and purpose of the Convention. Austria, Denmark, Finland, Germany, the Netherlands, Norway and Sweden made similar observations on Malaysia's reservations. In addition, France and the Netherlands partially objected to the State's modification of its reservations.

Denmark, Finland, the Netherlands, Norway and Sweden voiced their objection to Singapore's reservations as being contrary to the object and purpose of CEDAW. Germany, Mexico, the Netherlands and Sweden also objected to Thailand's previous reservation based on national security as contradictory to the object and purpose of the Convention, but Thailand later withdrew this reservation. Finally, Finland, the Netherlands and Norway objected to Singapore's reservations as being contrary to the object and purpose of CEDAW.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1987)²⁶

Cambodia, Indonesia, Laos, the Philippines, Thailand and Vietnam are party to the CAT. Brunei Darussalam is a signatory State. Five of them formulated declarations and reservations. None of the ASEAN Member States made declarations under Articles 21 and 22, which determine the recognition of the Committee against Torture to receive and consider communications from States Parties and from or behalf of individuals.

The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has the objective "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and

²⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with Article 27(1), United Nations, *Treaty Series*, Vol. 1465, p. 85.

other cruel, inhuman or degrading treatment or punishment”²⁷ and to establish a Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (or Subcommittee on Prevention).

So far, the ASEAN Member States are in general reluctant to accede to this Protocol. Of the ASEAN Member States, only Cambodia and the Philippines became State Parties. The Philippines formulated a declaration. Specifically, this State declared the postponement of the implementation of its obligations under Part III of the Optional Protocol on the mandate of the Subcommittee on Prevention or the Committee against Torture, specifically Article 11(1)(a). This deals with visitations by the Subcommittee on Prevention to places referred to in Article 4. This Subcommittee can make recommendations to State’s Parties on the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment.

Brunei Darussalam

Brunei Darussalam declared upon signing that it reserved the right to formulate observations, interpretative understandings and/or declarations upon ratification, but has not ratified this Convention yet.

Indonesia

Indonesia declared that Article 20(1), 20(2) and 20(3) on competences of the Committee against Torture need to be implemented in strict compliance with the principle of the sovereignty and territorial integrity of States. This State also made a reservation, as it does not consider itself to be bound by Article 30(1) on arbitration and dispute settlement by the ICJ. Disputes on the interpretation and application of the Convention which cannot be settled through the channel of Article 30(2) may be referred to the ICJ when all parties of the dispute give their consent.

Laos

Laos does not recognise the competence of the Committee against Torture under Article 20 and does not consider itself to be bound by Article 30(1) on arbitration and dispute settlement by the ICJ. Laos also formulated a declaration on the term ‘torture’ in Article 1, which means torture as defined in national and international law, and declared that the Convention is not a legal basis for extradition.

Thailand

Thailand stated that the Thai Criminal Code does not have an equivalent to torture, but has comparable provisions. Therefore, it formulated an interpretative

²⁷ Article 1 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 entered into force on 22 June 2006, United Nations, *Treaty Series*, Vol. 2375, p. 237; GA Resolution A/RES/57/199 of 9 January 2003.

declaration that states that Articles 1, 4 and 5 (on the term torture, torture as an offence under national criminal law and on jurisdiction) are interpreted in conformity with the Thai Criminal Code. Also included was the ambition to revise domestic law and to be more consistent with Articles 1, 4 and 5. Thailand also made a reservation, namely that it does not consider itself to be bound by Article 30(1).

Vietnam

Vietnam declared that it does not recognise the competence of the Committee against Torture and does not consider itself to be bound by Article 30(1) on arbitration and dispute settlement by the ICJ. This State also observed that the Convention is not a direct legal basis for extradition with respect to offences referred to in Article 4.

Three ASEAN Member States do not consider themselves to be bound by the provision on arbitration and dispute settlement by the ICJ. Other State Parties have objected to a number of the declarations and reservations. Austria objected to the declaration of Laos, which Austria considered to constitute a reservation. Austria argued that Laos made a reservation of general and indeterminate scope by referring to national law, which is not compatible with the object and purpose of the Convention. The Czech Republic, Finland, Germany, Greece, Ireland, Italy, Latvia, the Netherlands, Norway, Portugal, Sweden and the United Kingdom made similar objections. Sweden objected to the interpretative declaration of Thailand, as a number of the provisions are made subject to provisions of the Thai Criminal Code. Accordingly, it is argued that it is unclear to what extent Thailand considers itself to be bound by the treaty obligations and raises doubts regarding the commitment to the object and purpose of the Convention. Poland objected to Vietnam's reservation, as it would lead to an exemption of certain provisions of the treaty.

Convention on the Rights of the Child (CRC, 1990)²⁸

By 1995, all ASEAN Member States were party to the CRC. This Convention proves to be subject to a high number of declarations and reservations, which give prevalence to national law, policies and contexts.

Indonesia withdrew its reservation made upon ratification in 2005, in which Articles 1, 14, 16, 17, 21, 22 and 29 were applied in conformity with its Constitution. These articles concern the age limit, the freedom of thought conscience and religion, the right to privacy, family, home or correspondence, access to information, adoption, refugees, education and development. In addition, Myanmar withdrew its reservation made upon accession on Articles 15 and 37 in 1993, which were subjected to laws, rules, regulations, procedures and practice as well as with its traditional, cultural and/or religious values.

²⁸ Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49, United Nations, *Treaty Series*, Vol. 1577, p. 3.

The CRC has three Optional Protocols. The first is the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Except for Myanmar that is only a signatory State, all ASEAN Member States are party to this Optional Protocol. These States, with reference to their national legislation, formulated declarations on topics like the minimum age of recruitment or enlistment, sex, whether it is voluntary or compulsory, and the requirements for recruitment. No objections to these reservations were made.

The second protocol is called the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The majority of the ASEAN Member States are party to this Optional Protocol, whereby two of the ASEAN Members formulated declarations. Vietnam withdrew its reservations on Article 5(1) to (4) of this Optional Protocol, regarding extraditable offences. Laos does not consider itself to be bound by Article 5(2) of the Optional Protocol whereby one of the States involved does not have an extradition treaty. Malaysia clarified the phrase ‘any representation’ in Article 2(c) on child pornography as ‘any visual representation’ and understands that Article 3 (1)(a)(ii) on improperly inducing consent for adoption is applicable to Parties to the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The common ground for this Protocol seems to be great, and no objections were made to the reservations.

Only Thailand as ASEAN Member State has ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, hereby recognising the competence of the Committee of the Rights of the Child.

Brunei Darussalam

Brunei Darussalam expressed reservations to provisions that may be contrary to its Constitution and to the beliefs and principles of Islam, and in particular on Articles 14 on the freedom of thought, conscience and religion, Article 20(3) on alternative care, and Article 21(b) to (e) on intercountry-adoption. In 2015, Brunei Darussalam partially withdrew its reservations to Articles 20(1), 20(2) and 21(a), which were subjected to its Constitution, the beliefs and principles of Islam, the State and religion.

Malaysia

Malaysia made reservations to Article 2 on non-discrimination, Article 7 on the immediate rights after being born, Article 14 on the freedom of thought, conscience and religion,²⁹ Article 28(1)(a) on free and compulsory primary education for all, and Article 37 on the prohibition of torture or other cruel, inhuman or degrading

²⁹ Striking is that paragraph 3 lists a number of general grounds for restrictions, as it reads as follows: Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, see Conventions on the Rights of the Child, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>, last accessed 11 September 2018.

treatment or punishment and on the deprivation of liberty. It declared that these provisions are applicable only if they are in conformity with its Constitution, national laws and national policies.

In 2010, Malaysia declared with respect to Article 28(1)(a) that primary education is made compulsory and that monetary aids and other forms of assistance is made available. In addition, Malaysia withdrew its reservations made upon accession on Articles 22, 28(1)(b), 28(1)(c), 28(1)(d), 28(1)(e), 28(2), 28(3), 40(3), 40(4), 44 and 45. These articles deal with child refugees, education, criminal law and alternatives to institutional care, reporting obligations of State Parties, implementation of the Convention and international cooperation.

Singapore

Of all ASEAN Member States, Singapore made the most reservations and declarations to the CRC. It declared that the child's rights, and in particular those defined in Article 12 on the freedom to form and express an opinion and Article 17 on access to information, are "exercised with respect for the authority of parents, schools and other persons who are entrusted with the care of the child and in the best interests of the child and in accordance with the customs, values and religions of Singapore's multi-racial and multi-religious society regarding the place of the child within and outside the family".³⁰ Regarding Article 19 on the prohibition on all forms of violence, injury, abuse, neglect, maltreatment or exploitation and Article 37 on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment national influences are also visible. More specifically, the application of any prevailing measures prescribed by law for maintaining law and order, measures and restrictions prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others and the judicious application of corporal punishment in the best interest of the child are included.

With respect to its reservations, Singapore stated that its Constitution and the laws "provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution".³¹ On the entry into, stay in and departure from Singapore, as well as citizenship, Singapore also reserved the right to apply such legislation and conditions as it may deem necessary and in accordance with the laws of Singapore. Singapore also reserved the right to apply Article 32 (on protection against economic exploitation and

³⁰ United Nations Treaty Collections, Convention on the Rights of the Child, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

³¹ United Nations Treaty Collections, Convention on the Rights of the Child, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

hazardous work) subject to its national employment legislation. On Article 28(1)(a), Singapore does not consider itself to be bound by the requirement to provide free and compulsory primary education for all. It reasoned that it is unnecessary in its social context where “in practice virtually all children attend primary school”.³² Finally, it also reserved the right to provide free primary education only to children who are the State’s citizens.

Thailand

Thailand made the reservation that the application of Article 22 on refugees is subject to its national laws, regulations and prevailing practices. Thailand withdrew its reservations on Article 29 on education and development in 1997 and on Article 7 regarding immediate rights after birth in 2010.

In a similar fashion to the objections made by the other State Parties on the declarations and reservations made to CEDAW, the objections with respect to the reservations and declarations to the CRC also centre on the critique that they may contradict the object and purpose of the Convention or are incompatible with international law because of its unlimited scope and undefined character.

Specifically, Austria objected to the reservation of Brunei Darussalam and Malaysia to the admissibility of the reservations if their application would negatively affect compliance with the obligations that are essential for the fulfilment of the object and purpose. Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Portugal and Sweden also objected to the reservation of Brunei Darussalam as being incompatible with the object and purpose of the CRC or as inadmissible under international law, because of its unlimited scope and undefined character. Austria, Finland, Germany, Ireland, the Netherlands, Norway, Portugal and Sweden drew a similar conclusion on Malaysia. Belgium objected Singapore’s constitutional limits, as well as Finland, Germany, Italy, the Netherlands, Norway, Portugal and Sweden. Germany, Ireland and Portugal objected to the reservation of Myanmar, and finally, Ireland also objected to Thailand’s reservation.

Convention on the Rights of Persons with Disabilities (CRPD, 2008)³³

All ASEAN Member States are party to the CRPD; a slight minority formulated reservations or declarations. Thailand decided to withdraw its interpretative declaration, which subjected Article 18 on the liberty of movement and nationality to Thailand’s national laws, regulation and practices. Brunei Darussalam, Malaysia and Singapore have formulated reservations.

³² United Nations Treaty Collections, Convention on the Rights of the Child, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en#EndDec>, last accessed 11 September 2018.

³³ Convention on the Rights of Persons with Disabilities, United Nations, adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 and entry into force on 3 May 2008, in accordance with Article 45(1), United Nations, *Treaty Series*, Vol. 2515, p. 3

The Optional Protocol has only been signed by Cambodia, whilst Thailand has acceded to the Protocol.

Brunei Darussalam

Brunei Darussalam again formulated a general reservation. Specifically, it expressed its reservation regarding those provisions “that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam”.³⁴

Malaysia

Malaysia also referred to national legislation in its declaration, as it declared that “its application and interpretation of the Federal Constitution of Malaysia pertaining to the principles of non-discrimination and equality of opportunity shall not be treated as contravening Articles 3(b), 3(e) and 5(2) of the said Convention.”³⁵ This State also declared that it recognises the rights of persons with disabilities to take part in cultural life, recreation, leisure and sport as stipulated in Article 30 and considers the recognition a matter for national legislation. It also stated that it does not consider itself to be bound by Articles 15 on the prohibition of torture and Article 18 on liberty of movement and nationality.

Singapore

Singapore declared that “it reserves the right to continue to apply its current legislative framework in lieu of the regular review referred to in Article 12, paragraph 4 of the Convention”.³⁶ It also underscored the principle of non-discrimination with a reservation on the provision by private insurers (Article 25(e)). Finally, with respect to Article 29(a)(iii) it stated that it reserves the right to continue to apply its current electoral legislation on assistance in voting procedures.

Objections were made to the aforementioned declarations and principles for being incompatible with the object and purpose of the Convention. Austria, Belgium, the Czech Republic, Germany, Hungary, Ireland, Italy, Latvia, the Netherlands, Norway, Peru, Poland, Portugal, Romania, Sweden, Switzerland and the United Kingdom objected to this general reservation of Brunei Darussalam as being incompatible with the object and purpose of the Convention. Austria, Belgium, Germany, Hungary, Ireland, the Netherlands, Portugal, Slovakia, Sweden

³⁴ Reservation made by Brunei Darussalam, United Nations Treaty Collections, Convention on the Rights of Persons with Disabilities, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-15&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

³⁵ Declaration made by Malaysia, United Nations Treaty Collections, Convention on the Rights of Persons with Disabilities, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-15&chapter=4&clang=_en#EndDec>, last accessed 30 October 2018.

³⁶ Declaration made by Singapore, United Nations Treaty Collections, Convention on the Rights of Persons with Disabilities, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-15&chapter=4&clang=_en#EndDec>, last accessed 11 September 2018.

and Switzerland objected to Malaysia's reservation. As Articles 15 and 18 are considered to relate to fundamental principles of the Convention, the exclusion of their application is considered as being contrary to the object and purpose of the Convention. Regarding Malaysia's declaration, it was argued by the Netherlands that it constitutes in substance a reservation. The application is made subject to national legislation, which is incompatible with the object and purpose. Romania objected to Singapore's reservation to Articles 12, 25 and 29 of the Convention, as it considered that the reservation subordinates the application of some fundamental provisions to its domestic law, which is incompatible with the object and purpose of the Convention.

With respect to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the International Convention for the Protection of all Persons from Enforced Disappearance, no reservations or declarations are formulated.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW, 2003)

This Convention has been signed by Cambodia and ratified by Indonesia and the Philippines. No declarations and reservations have been made by these States.

International Convention for the Protection of all Persons from Enforced Disappearance (CED, 2010)³⁷

Cambodia acceded to this Convention. Indonesia, Laos and Thailand signed this document. These States have not made any declarations and reservations.

2.2 Patterns in the position of the ASEAN Member States towards core UN human rights conventions

Based on Table 1 (Annex 1) and the previous section, the following observations can be made.

States may have different reasons for becoming party to a convention, which can affect the actual implementation of human rights. Improving one's legitimacy and position in the international community could form a leading motivation of a State over the moral motives. In this respect, Cambodia and Laos have become party to a significant number of international human rights conventions with a considerable number of ratifications in 1992 and the mid-2000s respectively. According to Davies, the number of conventions to which Cambodia is a party could be

³⁷ International Convention for the Protection of all Persons from Enforced Disappearance, adopted on 20 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/177, entry into force on 23 December 2010, in accordance with Article 39(1), United Nations, *Treaty Series*, Vol. 2716, p. 3.

explained by the Paris Accords of 1991, which required Cambodia to observe international human rights instruments.³⁸

Their ratifications contrasts the way in which these States are generally perceived in the ASEAN context, as these Member States are grouped within ASEAN as part of the so-called ‘CMLV countries’, consisting of Cambodia, Myanmar, Laos and Vietnam. These States are described as the illiberal States that joined ASEAN in the period from 1995 to 1999³⁹ and are regarded as the most conservative States in relation to human rights. For instance, they opposed the creation of a regional human rights body⁴⁰ and desired a more conservative human rights declaration, limiting the application of universal human rights standards in ASEAN.⁴¹

From Table 1 it also follows that Indonesia, the Philippines and Thailand ratified or acceded to the majority of the discussed UN human rights instruments. This corresponds to the general observation that these States are the forerunners in ASEAN’s regional human rights cooperation. Related to this, Davies observed that “States that combine high levels of engagement with the human rights treaty system and more democratic forms of government, such as Indonesia, the Philippines, and Thailand, are likely to move towards more norm consistent behaviour under the pressure of civil society, treaty bodies, and national human rights institutions (NHRIs)”.⁴²

Regarding the common ground in terms of content, the following observations can be made. From Table 1, it follows that all ASEAN Member States are party to the CEDAW, CRC and CRPD; the topics of which are considered to be politically less sensitive among the ASEAN Member States.⁴³ The CEDAW and CRC were both ratified rather quickly by the ASEAN Member States; only Brunei Darussalam acceded to CEDAW substantially later than its fellow ASEAN Members. This common ground is in line with the ratification and accession by other States, as the CRC has been ratified by all States around the world except for the United States of America and CEDAW has been ratified by a large number of States. Within ASEAN, it corresponds with the room that exists within this organisation for including a focus on women and children in ASEAN’s human rights oriented

³⁸ General Assembly Resolution 46/608 (*Final Act of the Paris Conference on Cambodia (Agreement on a Comprehensive Political Settlement of the Cambodia Conflict - Paris Peace Agreement)*), UN Doc. A/46/608, 30 October 1991, cited in Mathew Davies, ‘States of Compliance?: Global Human Rights Treaties and ASEAN Member States’ (2014) 13 *Journal of Human Rights* 414, p. 417.

³⁹ John D. Ciorciari, ‘Institutionalising Human Rights in Southeast Asia’ (2012) 34 *Human Rights Quarterly* 695, p. 703.

⁴⁰ John D. Ciorciari, ‘Institutionalising Human Rights in Southeast Asia’ (2012) 34 *Human Rights Quarterly* 695, p. 708.

⁴¹ Gerard Clarke, ‘The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012’ (2012), 11 *Northwestern Journal of International Human Rights* 1, p. 19.

⁴² Mathew Davies, ‘States of Compliance?: Global Human Rights Treaties and ASEAN Member States’ (2014) 13 *Journal of Human Rights* 414, p. 428.

⁴³ Mathew Davies, ‘States of Compliance?: Global Human Rights Treaties and ASEAN Member States’ (2014) 13 *Journal of Human Rights* 414, p. 415.

documents and the establishment of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children, which is further discussed in Chapter V.

Given the fact that all Member States are party to the CRPD, greater opportunities are created for regional cooperation on the rights of persons with disabilities. This is also in line with the general tendency of ASEAN to focus on the rights of vulnerable persons.

The low number of ASEAN Member States as State Party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is striking, whereas at ASEAN level, migrant workers are a topic of common concern and cooperation. Specifically, ASEAN formulated its ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers in 2007 and established the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in the same year (also further discussed in Chapter V). In addition, all ASEAN Member States are members of the International Labour Organisation (ILO). Based on their membership, States are bound by the ILO Declaration on Fundamental Principles and Rights at Work.

Already in 1999, Liann Thio concluded that the low number of ratifications and the wide-ranging use of reservations “framed in terms of non-acceptance of obligations beyond constitutional limits” cast doubt over the sincerity of the commitment of these States.⁴⁴ Almost two decades later, it seems that the picture has in essence not changed. Nevertheless, it is also argued that reservations can be helpful “inasmuch as they promote greater, albeit imperfect, state engagement with the rights regime than otherwise would be the case”.⁴⁵ According to Davies, “[i]t is possible that for many ASEAN members, reservations may be a necessary stage to pass through as states move from blanket disinterest in the global treaty system to engagement and ultimately compliance.”⁴⁶ This relates to the idea of considering the universality of human rights as a process (Subsection 3.2, Chapter II).

Taking a closer look at CEDAW, CRC and CRPD, the following can be observed. While all ASEAN Member States are party to these Conventions, the first two are subject to a high number of declarations and reservations. Specifically, Brunei Darussalam, Indonesia, Malaysia, Myanmar, Singapore, Thailand, and Vietnam made declarations on and/or reservations to the CEDAW. Regarding the CRC, declarations and reservations have been made by Brunei Darussalam, Malaysia, Singapore and Thailand. The most salient reservations on these

⁴⁴ Liann Thio, ‘Implementing human rights in ASEAN countries: “Promises to keep and miles to go before I sleep”’ (1999) 2 *Yale Human Rights and Development Law Journal* 1, p. 9.

⁴⁵ Mathew Davies, ‘States of Compliance?: Global Human Rights Treaties and ASEAN Member States’ (2014) 13 *Journal of Human Rights* 414, p. 422. He hereby made reference to Johanna Fournier, ‘Reservations and the effective protection of human rights’ (2010) 2 *Goettingen Journal of International Law*, 437, pp. 439-442.

⁴⁶ Mathew Davies, ‘States of Compliance?: Global Human Rights Treaties and ASEAN Member States’ (2014) 13 *Journal of Human Rights* 414, p. 422.

conventions are made by Brunei Darussalam and Malaysia, and in line with their statements, Singapore. These States included references to the national legal context, as well as religious laws. While Brunei Darussalam, Malaysia and Singapore can be grouped together in terms of the type of declarations and reservations they make, classifying them in one group corresponds to the way these States are generally perceived in ASEAN context, as they are often considered as ASEAN's moderate Member States with respect to human rights.⁴⁷ With respect to the drafting of the ASEAN Charter for instance, Clarke commented that it was predominantly Thailand and Indonesia that desired to achieve a progressive declaration in which universal human rights standards are upheld, while the CMLV countries, and at times in alliance with Singapore, Malaysia and Brunei Darussalam, wanted a more conservative document.⁴⁸

Primacy is not only provided to the national context with respect to the CEDAW and the CRC, but provisions of other conventions are also subjected to national constitutions, legislation, regulations and local customs, values and religions; furthermore the principle of sovereignty and territorial integrity of States is also stressed. Brunei Darussalam, Laos, Malaysia, Myanmar, Singapore and Thailand have referred to their internal laws. One of Singapore's reservations led to subjecting a provision of the CRC to its national law on maintaining law and order, measures and restrictions prescribed by law and which are necessary in the interests of national security, public safety, public order, the protection of public health or the protection of the rights and freedoms of others.

A number of the ASEAN Member States have underscored the importance of national particularities in general, and in the past, Asian values in particular. Although certain human rights are restricted, the reservations do not concretise what these particularities exactly are, as the reservations generally refer to national law, policies, customs, values and religions.

Although it is possible to issue interpretative declarations and reservations, the extent to which they are allowed are subject to international treaty law. Following customary law and as codified in Article 19(c) Vienna Convention on the Law of the Treaties, reservations incompatible with the object and purpose of a treaty are not permitted. This limitation is generally also included in each individual convention. Accordingly, it is a general principle that a State Party cannot invoke provisions of national law as a justification for its failure to comply with its obligations under a treaty (see also Article 27 Vienna Convention on the Law of the Treaties).

As many of the objecting States underscored, it is the common interest of State Parties that the object and purpose is respected and that States are prepared to

⁴⁷ For instance observed by Carlos Medina during the interview with the author; Interview with Carlos Medina, Director of the Ateneo Law Faculty's Human Rights Center at Ateneo de Manila University, (Manila 10 November 2009).

⁴⁸ Gerard Clarke, 'The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012' (2012), 11 *Northwestern Journal of International Human Rights* 1, p. 19.

undertake legislative and policy changes in order to comply with their treaty obligations. However, when one scrutinises a number of the declarations and reservations issued by the ASEAN Member States, one can see that a number of them include general references to national law. Given the lack of specification in these reservations, the extent of commitment is unclear. This in turn raises doubts regarding the commitment of the reserving State and could undermine the basis of these human rights treaties. These reservations could thus be considered as weakening of international human rights standards. The previous section illustrated that some relativistic views have been withdrawn, which implies a change in thinking on the universal character of human rights.

Nevertheless, considering the low number of ratifications of certain UN conventions by the ASEAN Member States, cooperation on certain human rights topics could be problematic. In these cases, it is not a matter of difference of opinion on the interpretation or application of a certain human rights provision, but non-ratification of conventions altogether. For instance, the ICCPR and the ICESCR have only been ratified by a slight majority of ASEAN States, while the UDHR together with these Conventions are considered to constitute the International Bill of Human Rights. The ICCPR and the ICESCR have been ratified by respectively 6 and 7 ASEAN Member States. While it was often said that Asian States, including Southeast Asian States, are more focused on economic, social and cultural rights instead of civil and political rights, this is overall not mirrored in the number of ratifications of the ICCPR and the ICESCR by the ASEAN Member States.

Except for Myanmar, the group of States that is not party to the ICCPR and the ICESCR is the same for both conventions: Brunei Darussalam, Malaysia, and Singapore. The fact that Myanmar has not acceded to the ICCPR is not surprising given the only recent ambition to change from a dictatorial military rule to a democracy, while the other three States are surprising. Specifically, during the Asian values debate the argument was made that a certain level of advancement must be reached by a State before it can promote and protect individual rights such as civil and political rights. While it is safe to say that Brunei Darussalam, Malaysia and Singapore have reached a certain level of advancement, ratification of the ICCPR in these States has not followed. In contrast, ASEAN's economically less advanced Member States have, in fact, ratified these two Conventions.

Paul Close and David Askew have pointed out that only a minority of the world's population lives in social circumstances favourable to the full enjoyment of human rights,⁴⁹ which Donnelly described as the relativity of enjoyment. According to Close and Askew, Western States are able to more easily achieve the (high) standard of human rights set due to their generally good social conditions. For poorer, often non-Western States with less favourable conditions it is difficult to live up to these criteria. It has been argued that this inequality makes these non-

⁴⁹ Paul Close and David Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (The International Political Economy of New Regionalism Series, Aldershot, Ashgate 2004), p. 25.

Western States reluctant to adopt the same set of human rights standards.⁵⁰ While this is generally presumed, the ratification in ASEAN Member States brings nuances to this observation.

Regarding the procedural aspects to ensure that the human rights standards to which the ASEAN Member States have committed themselves and the extent of the mandate of dispute settlement mechanisms, the following observations can be made. A large number of the ASEAN Member States do not consider themselves to be bound by provisions on (the automatic) arbitration and dispute settlement by the ICJ. States which have restricted dispute settlement by the ICJ to the consent of all parties in dispute or which do not consider themselves bound by these provisions on dispute settlement are Brunei Darussalam, Indonesia, Laos, Myanmar, Singapore, Thailand and Vietnam. As seven of ASEAN's Member States have voiced reservations to dispute settlement, it remains to be seen whether there is room for dispute settlement on human rights topics at the regional level.

Also salient is that the competence of the committees mentioned in the different human rights instruments are in general not recognised and that the optional protocols on the competence of the committees to receive and consider communications from individuals are in general not endorsed. The few States that have signed or are party to these optional protocols are Cambodia, the Philippines and Thailand, whereby this is only the case with respect to a very limited number of the documents discussed. Slightly more space is visible with respect to CEDAW, as its Optional Protocol on the competence of the Committee on the Elimination of Discrimination against Women to receive and consider communications on behalf of individuals or groups of individuals, has been signed by Indonesia and ratified by Cambodia, the Philippines and Thailand. This supports the notion that there is more room for cooperation on topics related to women. However, the general tendency of ASEAN Member States is to backtrack with respect to the mechanisms installed at the international level to protect human rights. This could have implications for the mandate for the ASEAN Intergovernmental Human Rights Commission, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, which are analysed in Section 5 of Chapter V.

⁵⁰ Paul Close and David Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (The International Political Economy of New Regionalism Series, Aldershot, Ashgate 2004), p. 25.

3 THE CODIFICATION OF FUNDAMENTAL RIGHTS IN THE CONSTITUTIONS OF THE ASEAN MEMBER STATES

3.1 Introduction

Insight in the region's history and diversity in terms of politics and level of democracy contributes to a better understanding of the ASEAN context. The existing diversity in the region is a major influence on ASEAN and its ASEAN Way. The main characteristics are discussed in the following section. While it falls outside the scope of this research to analyse each Member State in depth, some general observations are illustrative. Therefore, some basic information regarding each State is provided prior to a discussion of the fundamental rights as enshrined in each constitution. Other authors have also referred to this added value. Muntarbhorn, for instance, observed that “[a]n initial glimpse at the background of each country reveals a degree of eclecticism politically which shapes the human rights situation at home”.⁵¹

3.2 Brunei Darussalam

Brunei Darussalam is a constitutional monarchy headed by a Sultan. Of all ASEAN Member States, this Islamic State is the smallest in size, as well as population. After being a British protectorate since 1888, Brunei Darussalam regained self-government in 1959. Furthermore, the country chose not to become part of the Federation of Malaysia. On 1 January 1984, the State became independent.⁵² In 1987, Brunei Darussalam was the first State that joined ASEAN after its establishment in 1967.⁵³

Brunei Darussalam has the most limited constitutional human rights guarantees. The circumstances are in general not favourable to human rights, as this State has been in a state of emergency since 1962 and has applied its Internal Security Act which was adopted in 1982, making it possible to detain people without judicial process. The State's Constitution was adopted on 29 September 1959 and last revised in 2011.⁵⁴

The freedom of religion, enshrined in Article 3 of its Constitution, especially deserves closer attention. This provision determines that the State's official religion

⁵¹ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 6.

⁵² Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 6-7.

⁵³ ASEAN Ministers of Foreign Affairs, *Declaration of the Admission of Brunei Darussalam into ASEAN*, Jakarta, 7 January 1984, <<http://agreement.asean.org/media/download/2017101114703.pdf>>, last accessed 11 September 2018.

⁵⁴ The Constitution of Brunei Darussalam, 29 September 1959 (last revised in 2011). Available at <http://www.agc.gov.bn/agc1/images/LOB/cons_doc/constitution_i.pdf> last accessed 11 September 2018.

is Islam, “provided that all other religions may be practised in peace and harmony by the persons professing them”. Yet, professing another religion leads in some cases to discrimination in employment. For example, Ministers and Deputy Ministers can, in principle, only be appointed if they are from the Malay race and profess the Islamic religion, unless otherwise decided by the Sultan (Article 4(5)).⁵⁵ Furthermore, the state of emergency (Article 83) can restrict human rights. The most striking provisions are enumerated in Article 83(4), which makes it possible to make orders on the following subjects: censorship, the control and suppression of publications, writings, maps, plans, photographs, communications and means of communications (sub a); arrest, detention, exclusion and deportation (sub b); transportation by land, air, or water and the control of the transport and movement of persons, animals and things (sub d); requiring persons to do work or render services (sub i); formation of tribunals and other bodies for the purpose of deciding any matters specified in any such orders (sub k); modification, amendment, supersession or suspension of all or any of the provisions of any written law (sub l); and the entry into, and search of, premises or other places, and search and interrogation of persons (sub m).

3.3 Cambodia

Cambodia is a constitutional monarchy with, at least on paper, a democratic political system. The main religion is Buddhism. The country became a French protectorate in 1863. After the Japanese intervention during the Second World War, France regained control until 1953 when Cambodia became independent.⁵⁶ In 1999, Cambodia was the last to be admitted as a Member of ASEAN.⁵⁷

The Constitution of Cambodia⁵⁸ refers in its preamble to the horrors of the Khmer Rouge regime and the determination to become a liberal multi-party democracy in which human rights are guaranteed and respect for the law is ensured. Chapter III deals with the rights and duties of Khmer citizens. The general provision (Article 31) stipulates the recognition and respect for human rights as enshrined in the UN Charter, the UDHR and all treaties and conventions related to human rights, women’s rights and children’s rights and establishes the principle of non-discrimination for Khmer citizens. It furthermore states the general limitation that the rights and liberties exercised by an individual shall not adversely affect the

⁵⁵ Of similar tenor is art. 84A(1) Constitution.

⁵⁶ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 17-21.

⁵⁷ ASEAN, *Declaration on the Admission of the Kingdom of Cambodia into the Association of Southeast Asian Nations* Hanoi, 30 April 1999, available at <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1999-Declaration-on-the-Admission-of-the-Kingdom-of-Cambodia-into-ASEAN.pdf>>, last accessed 11 September 2018.

⁵⁸ The Constitution of the Kingdom of Cambodia, 24 September 1993, unofficial English translation, supervised by Cambodia’s Constitutional Council, October 2015, <http://www.ccc.gov.kh/detail_info_en.php?_txtID=791>, last accessed 11 September 2018.

rights and freedoms of others and that this exercise must be in accordance with the law.

The constitution lists nineteen specific articles on rights and duties (Articles 32-46). These provisions deal with, *inter alia*, the right to life, liberty and security, nationality and the prohibition to be exiled or extradited without mutual agreement between the States concerned, the right to vote or to be elected, to participate in political, economic, social and cultural life, labour, equal pay, social benefits and trade unions, the right to strike or to hold peaceful demonstrations, personal integrity, human dignity and the rights of detainees, the right to denounce, complain or file claims in case the State or social organisations breach the law, the freedom to travel and to reside, confidentiality of correspondence, the freedom of expression, assembly, association and to form political parties, the freedom of religion, the right to (land) ownership, and women's rights.

Furthermore, the duties of individuals are also enshrined in Chapter III. Specifically, parents have the duty to take care of their children, raise them and educate them in order to become good citizens. Children have the duty to take care of their aged parents in accordance with Khmer custom (Article 47). It is mentioned that Khmer citizens have the duty to respect the Constitution and the laws, to participate in the national construction and to defend the motherland (Article 49), to respect the principles of national sovereignty and liberal multi-party democracy, and to respect public and private property (Article 50). Furthermore, the State is obliged to assure the protection of children's rights (Article 48).

Human rights related provisions are also included in other chapters of the constitution. These include the priority of the State to improve the living conditions and the welfare of its citizens (Article 52), the preservation and protection of the environment and the balance of natural resources (Article 59), to promote economic development (Article 61), and to secure a suitable living standard for its citizens (Article 63). Chapter VI on education, culture and social affairs also includes provisions on human rights issues. These entail the right of citizens to quality education (Article 65), freedom of education, equal access to schooling, free primary and secondary education at public schools for all citizens (Articles 65-68), and the preservation and development of national culture (Article 69). The health of the people is guaranteed by disease prevention and free medical care (Article 72). Special attention is given to mothers and children (Article 73), disabled people and families of combatants killed in action (Article 74), and the workforce by establishing a social security regime (Article 75). For different State organs Khmer citizens have the right to vote and to be elected (Articles 76 and 99 new). The judiciary should guarantee impartiality and protect the rights and liberties of the citizens (Article 128 new). Furthermore, every citizen has the right to raise the unconstitutionality of laws (Article 141 new). Citizens have the right to participate in the National Congress. This body is also obliged to keep citizens informed on affairs of national interest and to raise issues or makes suggestions to State authorities (Article 147 new). Finally, it is made explicit that all laws and decisions

of State institutions must be in conformity with the Constitution (Article 152 new two).

When reading these human rights provisions, it is striking that these provisions stipulate that Khmer citizens are the bearers of these rights and duties, instead of stating that everyone has these rights and duties. Only some provisions dealing with the right to life do not restrict the rights to citizens (Articles 32 and 38), which could imply that the right to life is considered as a *ius cogens* norm. The right to ownership is not further restricted (Article 44). The provisions on women's and children's rights are also not limited to Khmer citizens (Articles 45, 46 and 48).

Interestingly, the Cambodian Constitution also includes the principle of non-interference in another State's internal affairs (Article 53).

Recently, controversial laws and constitutional amendments were signed by the Senate President, which included a *lese majesté* law that is considered incompatible with Cambodia's obligations under international human rights law.⁵⁹ In addition, the appointment of secretaries of state is now accomplished by royal decree based on Articles 34, 42, 49, 53 and 118 of the constitution and without ratification by the National Assembly.⁶⁰

3.4 Indonesia

Indonesia is the largest ASEAN Member State both in terms of geographical size, as well as population. It is also home to the world's largest Muslim population. Yet, the country is culturally, religiously and ethnically diverse. This diversity is one of the reasons that this unitary State, which is headed by a president, became less centralised over the years. It also determined the secularity of the country, although the role of Islam in politics is still a sensitive topic of debate. The blasphemy charges against Jakarta Governor Basuki Tjahaja Purnama, who was eventually sentenced to two years imprisonment, for instance, illustrates that the State's democratic politics are being tested.⁶¹

In the colonial era Indonesia experienced Portuguese, Dutch, British and Japanese rule. The country declared itself independent on 17 August 1945 and was given sovereignty from the Netherlands in December 1949. After 'Guided

⁵⁹ The Office of the High Commissioner for Human Rights (UN Human Rights), 'UN Experts Say Constitutional Changes in Cambodia Impinge on Democracy' (Geneva, 20 February 2018) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22674&LangID=E>>, last accessed 11 September 2018.

⁶⁰ Rathavong Ven, 'Cabinet Okays Penal Code and Constitution Changes' *Khmer Times* (2 February 2018), <<https://www.khmertimeskh.com/50106302/cabinet-okays-penal-code-constitution-changes/>>, last accessed 11 September 2018.

⁶¹ See, for example, Dina Afrianty, 'Islam and Politics: Indonesia's Identity Crisis' *Aljazeera* (22 November 2016), <<http://www.aljazeera.com/indepth/opinion/2016/11/islam-politics-indonesia-identity-crisis-161121082414557.html>> last accessed 11 September 2018) and Kate Lamb, 'Jakarta Governor Ahok sentenced to two years in prison for blasphemy' *The Guardian* (9 May 2017), <<https://www.theguardian.com/world/2017/may/09/jakarta-governor-ahok-found-guilty-of-blasphemy-jailed-for-two-years>> last accessed 11 September 2018.

Democracy' of Sukarno (President from 1945 until 1967) and especially after the fall of Suharto in 1998, the people's demand for democracy increased. The country has made a leap forward from authoritarian rule towards democracy. Today, it is the largest democracy in Southeast Asia. Indonesia furthermore played a leading role in the foundation of ASEAN.⁶²

Indonesia's Constitution dates back to 18 August 1945. It was repealed in 1948, but was reinstated on 5 July 1959.⁶³ Since then, the Constitution has been amended four times. The Second Amendment (enacted on 18 August 2000) is key to Indonesia's human rights protection. It expanded the number of human rights guaranteed in its constitution, which were quite limited in the 1945 Constitution. Also important is Law No. 39 of 1999 on Human Rights. The constitution itself is based on *Pancasila*, Indonesia's official political philosophy formulated by Sukarno in 1945. The five principles are "believe in the one and only God, just and civilised humanity, the unity of Indonesia, democracy led by the wisdom of deliberations among representatives, [and] social justice for the whole of the people of Indonesia." These values influence the State's human rights perception. Especially the first two principles require further clarification. The first principle is explained in the sense of religious tolerance and freedom of religion, whilst the second is seen as balancing individual rights, on the one hand, with the individual's obligations towards the society and the State, on the other.⁶⁴ These principles are captured in the preamble of the Constitution, as well as in a number of specific provisions highlighted hereafter.

The constitution has a specific chapter on human rights (Chapter XA), containing eleven provisions.⁶⁵ These include the right to life, family life, children's rights, the right to self-realisation by the fulfilment of basic needs, the right to education, and benefitting from science and technology, and art and culture, equality, employment, nationality, the freedom of choice (on religion, education, occupation, nationality and residency), conscience, association, assembly, expression, the right to communicate and to information, the right to protect oneself, his or her family and property, the freedom from torture or inhuman and degrading treatment, the right to obtain political asylum, the right to physical and spiritual prosperity and a home, the right to medical healthcare, social security,

⁶² Sree Kumar, 'Introduction' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 3.

⁶³ In the meantime, Indonesia's constitutions were the 1949 Federal Constitution and the 1950 Provisional Constitution. The Provisional Constitution also included human rights.

⁶⁴ The Embassy of the Republic of Indonesia in London, 'The Philosophical Basis of Human Rights in Indonesia' <http://www.indonesianembassy.org.uk/human_right-2.htm> last accessed 6 December 2017.

⁶⁵ The Constitution of the Republic of Indonesia (unofficial translation), 18 August 1945. Available at <<http://www.embassyofindonesia.org/index.php/government/>> last accessed 11 September 2018. Human Rights are also included in Law No. 39 Year 1999 on Human Rights, 23 September 1999, unofficial translation available at <<http://www.refworld.org/docid/4da2ce862.html>> last accessed 11 September 2018, Chapter 2 and 3. It also includes obligations, see Chapter 4 (citizens), Chapter 5 (government).

property, non-discrimination, respect for cultural identities and the rights of traditional communities. The constitution explicitly lists non-derogable rights, *i.e.*, the right to life, the prohibition of torture, the freedom of thought, conscience and religion, the prohibition of enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect (Article 28I(1)). Alongside these rights, individuals have the duty to respect the human rights of others and to accept certain restrictions posed by law (Article 28J). The State has the responsibility to protect, promote, uphold, and fully realise human rights (Article 28I(4)).

A number of human rights are also guaranteed in other chapters. Customary law and traditional rights are recognised and respected by the State, provided that these traditions are in accordance with the State's societal development and principles (Articles 18B and 28I(3)). The State's citizens have the right to equality before the law and government, the right to work and the right and duty to participate in defending the State (Articles 27 and 30). The freedom of religion is guaranteed in Article 29, whereas education is regulated in Chapter XIII. Specifically, alongside the right the education, every citizen has the duty to undertake basic education, which is funded by the government (Article 31(2)). Moreover, the freedom on the maintenance and development of cultural values is guaranteed, and regional languages and cultural treasures are respected and preserved by the State (Article 32). A system of social security is also developed by the State (Article 34).

In Indonesia, the human rights are in general guaranteed for every person, except for Articles 27, 28D(3), 30 and 31, which are limited to 'every citizen'.

3.5 Laos

Laos, or Lao People's Democratic Republic, is also a republic. The change from a monarchy into a republic in 1975 was followed by the adoption of 'market socialism'. Nowadays, Laos can still be depicted as a socialist State based on a one-party system.⁶⁶ It is one of the poorest countries of Southeast Asia. This former French protectorate declared itself independent under pressure from Japan in 1945. The French declared Laos independent in 1949, and withdrew from Laos after the 1954 Geneva Conference.⁶⁷ Laos joined ASEAN in 1997, together with Myanmar.⁶⁸

⁶⁶ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 77.

⁶⁷ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 72-73.

⁶⁸ ASEAN Ministers of Foreign Affairs, *Declaration on the Admission of the Lao People's Democratic Republic into the Association of Southeast Asian Nations*, Subang Jaya, 23 July 1997, <<http://arc-agreement.asean.org/file/doc/2015/01/declaration-on-the-admission-of-the-lao-people-s-democratic-republic-into-the-asean.pdf>> last accessed 11 September 2018.

Although Laos has a one party system, the constitution underscores the State's objective to build Laos as, amongst others, a democratic State.⁶⁹ Chapter 4 of Laos' Constitution on 'Fundamental rights and the Obligations of Citizens' lists in eighteen provisions the fundamental rights and obligations of citizens, thus also not applying these rights and duties to everyone.⁷⁰ Only the chapter's last two articles deal with non-citizens. Rights included in this chapter deal with non-discrimination, the right to vote and to be elected, gender equality, education, work and related rights, the freedom of settlement and movement, the right to lodge complaints, petitions and propose ideas to State organisations, integrity of a person and home, the freedom of religion (including not to have a religion, which is not the case for all ASEAN Member States), speech, press, assembly and demonstration, and science, technology and art. The rights of Lao residents who reside abroad are protected by the State.

Duties are also included (Articles 47-49), as Lao citizens are to respect the constitution, laws, to observe labour discipline and to comply with regulations related to social life and public order. They also have to pay duties and taxes, defend the State, maintain security and fulfil military obligations. Article 50 and 51 deal with the rights of aliens, persons who cannot certify their nationality and foreigners.

Human rights related articles can also be found throughout the Constitution, most notably, in the chapters on the political regime and the socio-economic regime. These include subjects such as voting (Article 4 new and 54 new), the protection of the freedom and democratic rights of the people by the State, whereby the honour, well-being, lives, consciences and property of the people are explicitly addressed (Article 6), the inclusion of specific social organisations to develop the right to self-determination of the people and to protect their legitimate rights and interests (Article 7), rights and non-discrimination of ethnic groups and the development of their socio-economic level (Article 8), respect for one's religion and the prohibition of creating division between religions and classes (Article 9 new), property rights (Articles 16 and 17 new), education (including compulsory primary education, Article 22 new), the preservation and promotion of culture (Article 23 new), health (Articles 25 new and 26 new), labour (Article 27 new), social security (Article 28 new), and women and children (Article 29 new). In addition, multi-ethnicity is underscored throughout the constitution. Organisations and citizens are obliged to protect the environment and natural resources (Article

⁶⁹ See the Constitution's preamble; The Constitution of the Lao People's Republic (translation endorsed by the Law Committee of the National Assembly of the Lao PDR), 6 May 2003, <[http://www.mof.gov.la/sites/default/files/news/Constitution%20\(2003\)%20Eng.pdf](http://www.mof.gov.la/sites/default/files/news/Constitution%20(2003)%20Eng.pdf)> last accessed 11 September 2018.

⁷⁰ The Constitution of the Lao People's Republic (translation endorsed by the Law Committee of the National Assembly of the Lao PDR), 6 May 2003, <[http://www.mof.gov.la/sites/default/files/news/Constitution%20\(2003\)%20Eng.pdf](http://www.mof.gov.la/sites/default/files/news/Constitution%20(2003)%20Eng.pdf)> last accessed 11 September 2018.

19). Finally, judicial independence, open proceedings and the right to defend oneself are also included (Chapter 9).

Laos also states that one of the principles of its foreign policy is non-interference in each other's internal affairs (Article 12).

3.6 Malaysia

Malaysia was under Portuguese and British control during colonial time and occupied by the Japanese during WWII.⁷¹ After a short return to British control, Malaysia (in the structure of the Federation of Malaya) became independent during the Malayan emergency on 31 August 1957.⁷² Malaysia was formally established on 16 September 1963 and also included Singapore at that time. Nowadays, Malaysia is a constitutional democracy with a federal structure. Islam is the State's national religion. The role of the King and Royal State Rulers has diminished over time. Malaysia was furthermore one of the founding Member States of ASEAN. It has been argued that Malaysia's economic development occurred to some extent at the expense of democracy.⁷³

Malaysia guarantees human rights in its constitution,⁷⁴ albeit with numerous restrictions. While Islam is the religion of the Federation, the freedom of religion is also enshrined in the Constitution (Article 3). The constitution lists fundamental liberties (Part II) for all persons and citizens, which include the right to life and personal liberty, the prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equality before the law and non-discrimination, the prohibition of banishment or exile, the freedom of movement, speech, assembly and association, the freedom of religion and rights in respect of education and property. Human rights are also included in other parts of the constitution, such as the right to vote (Article 119), restrictions on preventive detention (Article 151), the freedom to teach, learn or use any other language than the Malay language, except for official purposes (Article 152), and the special position of Malays and natives of Sabah and Sarawak, and other communities (Article 153).

⁷¹ Melaka was between 1641 and the 1824 Anglo-Dutch Treaty under Dutch control; Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 85, 88, 93.

⁷² In 1963, the Federation of Malaya included next to Malaysia also Singapore and the Bornean territories of Sarawak and Sabah; John Bastin and Harry J. Benda, 'Post-Colonial Southeast Asia' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 13.

⁷³ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 82, 105 and John Subritzky, *Confronting Sukarno: British, American, Australian and New Zealand Diplomacy in the Malaysian-Indonesian Confrontation, 1961-5* (Palgrave Macmillan Basingstoke 2000) p. 214. Mahatir Mohamad's autocratic leadership reduced the level of democracy that Malaysia experienced in the 1960 during his term as Prime Minister; Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 95.

⁷⁴ Federal Constitution of Malaysia, 31 August 1957, last amended on 27 December 2007, reprint as of 1 November 2010, <http://www.agc.gov.my/agcportal/index.php?r=portal2/left&menu_id=dDI5alZpOWFcGl5MnZ5M1dtT1NNZz09>, last accessed 11 September 2018.

When examining the fundamental rights in more detail, some elements of the constitution are striking. For example, exceptions to the principle of non-discrimination are possible when they are expressly authorised by the Constitution (Article 8(2)). This includes that affirmative actions to protect the special position of Malays of Peninsular Malaysia and the indigenous people of Sabah and Sarawak under Article 153 are allowed. Major restrictions are related to Article 10 on the freedom of speech, assembly and association, which deserves special attention. These restrictions are formulated in Article 10(2), 10(3) and 10(4). Malaysia's Parliament is namely permitted by law to impose restrictions on the freedom of speech and expression in the interest of the security of the Federation, friendly relations with other countries, public order, morality, to protect the privileges of Parliament, to provide against contempt of court, defamation, or incitement to any offence. The right of assembly is restricted in light of security and public order. The freedom of association is also restricted, in terms of security, public order and morality. Finally, Article 10(4) states that Parliament may pass laws prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 Malaysian Constitution.

As stated above, Islam is Malaysia's national religion. Based on this, Article 11(4) stipulates that State or federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam. Also, any act contrary to any general law relating to public order, public health and morality is prohibited (Article 11(5)). The importance of Islam is also visible in the rights in respect to education, as it shall be lawful for the Federation or a State to establish, maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose (Article 12(2)).

Finally, some of the rights are available to citizens only, such as the freedom of speech, assembly and association. A general restriction is based on Article 149, on legislation against subversion, organised violence, and acts and crimes prejudicial to the public and emergency powers. These laws do not have to be consistent with Articles 5, 9, 10, 13 of the Constitution (*i.e.* right to life and personal liberty, the prohibition of banishment and the freedom of movement, speech, assembly and association, and the right to property). Malaysia's Internal Security Act was passed under this provision, which was replaced in 2012 by the Security Offences (Special Measures) Act. It is a controversial law as it grants special investigative powers in relation to security offences.⁷⁵ Emergency powers are also included in Article 150 in case security, economic life or public order is threatened and can contradict the Constitution, with the exceptions of provisions which relate to Islamic law or

⁷⁵ See for the text of the Act, Laws of Malaysia, Act No. 747, Security Offences (Special Measures) Act, Act 2012, <http://www.federalgazette.agc.gov.my/outputaktap/20120622_747_BI_Act%20747%20BL.pdf> last accessed 11 September 2018.

customs of the Malays, native law or customs of Sabah and Sarawak, citizenship, religion or language (Article 150(6) and 150(6a)).

3.7 Myanmar

Myanmar, colonised by the British and occupied by the Japanese during their rule in Southeast Asia, became independent on 4 January 1948. It was long the most isolated and most disputed Member State of ASEAN. The military staged a coup in March 1962; democratic elections became only recently possible again. In this respect, the release of Aung San Suu Kyi in November 2010 by the military junta and the roadmap to democracy mirrored a change in the country. This led in November 2015 to democratic elections, in which the political party of Aung San Suu Kyi won with a landslide victory.⁷⁶

Myanmar is both ethnically and religiously diverse, with the inward-looking military elite distrusting the ethnic minorities.⁷⁷ The current Rohingya-crisis is a clear example. Fearing foreign influences, including from other ASEAN Member States, the State continuously stressed the principles of State sovereignty and non-interference. Nevertheless, Myanmar joined ASEAN in 1997.⁷⁸

The most recent Constitution dates from 2008,⁷⁹ which guarantees human rights in Chapter VIII. While it was observed that this Constitution would grant Myanmar's military a leading role,⁸⁰ Chapter VIII deserves scrutiny to identify which human rights are formally included. In addition, Chapter I, on Myanmar's basic principles, addresses the right to equality, liberty and justice, custody, responsibilities of citizens, the promotion of socio-economic development, the rights of peasants and workers, education, health, the care for mothers, children and people in need, the freedom of religion and conscience, the right to property and inheritance, the right to vote and to be elected, the prohibition of criminal law with retrospective effect, human dignity, and the environment,

Chapter VIII of the constitution is entitled 'Citizen, Fundamental Rights and Duties of the Citizens'. As can be seen from this title, Myanmar also focuses on both rights and duties. Even though equal rights and protection are ensured for any

⁷⁶ See for example Jonah Fisher, 'Myanmar's 2015 landmark elections explained' *BBC news* (3 December 2015), <<http://www.bbc.com/news/world-asia-33547036>> last accessed 11 September 2018.

⁷⁷ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 109 and 117.

⁷⁸ ASEAN Ministers of Foreign Affairs, *Declaration on the Admission of the Union of Myanmar into the Association of Southeast Asian Nations*, Subang Jaya, 23 July 1997 <<http://arc-agreement.asean.org/file/doc/2015/01/declaration-on-the-admission-of-the-union-of-myanmar-into-asean.pdf>> last accessed 11 September 2018.

⁷⁹ Constitution of the Republic of the Union of Myanmar (2008) <http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf>, last accessed 11 September 2018.

⁸⁰ Aung Hla Tun, 'New Myanmar Constitution gives Military Leading Role' *Reuters* (19 February 2008), <<http://www.reuters.com/article/us-myanmar-constitution-idUSBKK10184120080219>> last accessed 11 September 2018.

person (Article 347), this State also makes a distinction in its formulation between persons in general and its citizens. The constitution pays special attention to women, (expecting) mothers and children (Articles 350-351), while also stating that the appointment of men to the positions that are suitable for men only cannot be prevented by anything in Section VIII (Article 352). Other topics are the right to settle and to reside, the protection of citizens' properties, the prohibition of enslavement and trafficking of persons, religion, education, health, the right to vote and to be elected, the right to conduct business, access to technology, investment and material, the right to ownership and use of property, the rights with respect to trials and the right to seek protection from the State.

A number of the rights may be restricted, such as the right to life and personal freedom (Article 353), privacy and security of one's home, property and correspondence (Article 357) and the prohibition of forced labour (Article 359). For a number of rights specific reasons for restricting these rights are included. This applies to the freedom of expression, assembly, association, and the development of one's language, literature, culture, religion and customs (Article 365), the freedom of religion (Article 360), the freedom to develop literature, culture, arts, customs and traditions (Article 365), and the right not to be held in custody for more than 24 hours without the remand of a competent magistrate (Article 376). These grounds are broad, vague and include restrictions such as Union security, prevalence of law and order, community peace and tranquillity, public order and morality, national solidarity, and public interest. A general suspension clause is included in Article 379, which included the following grounds: time of war, foreign invasion and time of insurrection. These last two grounds, together with time of emergency, are grounds to deny redress by due process of law for grievances entitled under law (Article 381). The rights of defence personnel and members of armed forces can also be restricted by law (Article 382).

Specific attention is paid to religion (Articles 306-264), in the sense that the special position of Buddhism is protected, that the recognised religions in Article 362 are supported and protected to its utmost, and that the abuse of religion for political purposes is forbidden.

Alongside these rights, the Constitution also lists a number of duties in Articles 383 to 390. Formulated in broadly, these articles embody high expectations for its citizens. Firstly, Article 383 indicates that every citizen has the duty to uphold non-disintegration of the Union and national solidarity and the perpetuation of sovereignty. Other duties are to abide by the constitution's provisions (Article 384), to safeguard the State's independence, sovereignty and territorial integrity (Article 385), to undergo military training and to serve in the armed forces (Article 386) and to enhance unity among national races and ensure public peace and stability (Article 387). This latter duty must be in conformity with the Union Spirit, although this provision does not make explicit what this means. The other duties a citizen has, concern the duty for the emergence of a modern developed Nation (Article 388), to pay taxes (Article 389) and to assist the Union in carrying out four tasks, namely (i)

preservation and safeguarding of cultural heritage, (ii) environmental conservation, (iii) striving for development of human resources, and (iv) protection and preservation of public property (Article 390).

3.8 The Philippines

The Philippines became independent in 1946, after their subordination to Spanish colonisers, American control (which had a ‘democratic mission’ and which intended on creating an independent Philippines⁸¹) and the Japanese occupation during the Second World War.⁸² The country was a parliamentary democracy with a strong civil society at the time of the formation of ASEAN in 1967.⁸³ After the Marcos era in which ‘constitutional authoritarianism’ and martial law replaced democracy, the country experienced a fluctuating level of democracy. The majority of its people are Christian, while in the Southern islands of Mindanao and Sulu people follow Islam.

The current Constitution dates back from 1987,⁸⁴ although president Rodrigo Duterte proposed to amend this constitution in order to set up a federal system of government to end the conflict with the Muslim community in the south and to further boost the economy.⁸⁵ When reading the Philippine Constitution, one can consider that this Member State formally has the most extensive human rights coverage of all ASEAN Member States. Nevertheless, there are in practice serious challenges, which recently led to the International Court of Justice to open a preliminary examination into the Duterte’s war on drugs campaign.⁸⁶

Article II enumerates the States’ principles and policies. Alongside references to national sovereignty, territorial integrity, national interest and the right to self-determination in its relation with other States, it also includes the following principles and policies: the adoption of the generally accepted principles of international law as part of the law of the land, maintaining peace and order, the

⁸¹ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 131.

⁸² While many Southeast Asian states were at first not uncharitable towards Japan because of the Japanese apparent ambition to oust Western colonisers, thereby using mottos like ‘Asia for the Asians’. The Philippines however, are an exception because of the American style of colonialism and the pro-American attitude; Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 133.

⁸³ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 124.

⁸⁴ The Constitution of the Republic of the Philippines 2 February 1987, Official Gazette <<http://www.officialgazette.gov.ph/constitutions/1987-constitution/>> last accessed 11 September 2018.

⁸⁵ Manuel Mogato, ‘Philippines’ Duterte starts Moves to amend the Constitution’ *Reuters* (9 December 2016), <<https://www.reuters.com/article/us-philippines-politics/philippines-duterte-starts-moves-to-amend-the-constitution-idUSKBN13Y10A>> last accessed 11 September 2018.

⁸⁶ The Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations, into the Situations in the Philippines and Venezuela (8 February 2018), <<https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>> last accessed 11 September 2018.

protection of life, liberty and property and the promotion of general welfare, freedom from poverty, guaranteeing full respect for human rights, the notion of family as basic autonomous institution, the protection of the mother and unborn child, the role of women and youth in nation building, the right to health, protecting and advancing the right to a balanced and healthful ecology, education, workers' rights, and the recognition and promotion of the rights of indigenous cultural communities within the framework of national unity and development, and equality.

The constitution guarantees human rights in Article III. In its Bill of Rights twenty-two sections are included. Specifically, they deal with the right to life, liberty, property and equal protection, the right to personal integrity, home and papers, the privacy of communication and correspondence, the freedom of speech, expression and the press, the right to assemble and petition, the freedom of religion, the liberty of abode and travel, access to information, the right to form trade unions, associations and societies, private property, access to (quasi)judicial bodies and legal assistance, the rights of a suspect of an offence, the right to a fair trial and related rights (sections 12-17), the prohibition of detention because of political beliefs and aspirations, the prohibition of involuntary servitude, the prohibition of excessive fines, cruel, degrading or inhuman punishment, the prohibition to be tried twice for the same offence, and the prohibition of ex post facto law.

An unusual provision is: "No person shall be imprisoned for debt or non-payment of a poll tax" (Section 20). This article is particular to the Philippine Constitution as a similar provision is not found in the constitution of any another ASEAN Member State. Economic, social and cultural rights are also included in the form of positive obligations for the State (Article 2), which covers subjects such as promoting a social order (Section 9, *i.e.*, no poverty through policies on social services, promotion of employment, rising living standards and improved quality of life), social justice (Section 10), human dignity and full respect for human rights (Section 11), family life, the life of mother and child (including unborn children) and government support to parents in raising their children (Section 12), youth (Section 13), the role of women and equality (Section 14), health (Section 15), healthy environment (Section 16), education, science, technology, arts, culture and sport (Section 17), workers' rights and welfare (Section 18), indigenous cultural communities (Section 22), NGOs, community based or sectoral organisations (Section 23).

Human rights are also enshrined in Article XIII on Social Justice and Human Rights, which formulates obligations on the State to protect and improve the right to human dignity, reduce inequalities and to remove cultural inequities. Topics that the State has to address are labour, agrarian and natural resources reform, urban land reform and housing, health, women, the role and rights of people's organisations, and human rights in terms of establishing an independent Commission on Human Rights. Article XIV deals with (free) education, the recognition of, respect for and the protection of the rights of indigenous cultural communities. Article XV focuses

on the family as the foundation of the nation and the duty of the family to take care of its elderly members.

3.9 Singapore

Singapore, a former British colony that was, like other States in the region, also under control of the Japanese occupier. While the city-state was first part of the newly formed Federation of Malaya, it became a self-governing territory under the 1958 Constitution and became an independent state on 9 August 1965. The protection of its sovereignty is included in a separate section (Part III) of its Constitution. Influenced by its past, Singapore's constitution has many similarities with the Constitution of Malaysia.

Today, it is economically the most prosperous Member State of ASEAN. Critique on Singapore has been that it does not live up to an adequate protection and promotion of civil liberties.⁸⁷ The Government is described as paternalistic and sometimes authoritarian that makes extensive use of the Internal Security Act and punitive defamation actions against its opposition.⁸⁸

Part IV of the Constitution enumerates a rather short list of fundamental rights.⁸⁹ These rights deal with the life and liberty of a person (including provisions with respect to arrest and detainment), the prohibition of slavery and forced labour, protection against retrospective criminal laws and repeated trials, equal protection, the prohibition of banishment and freedom of movement, the freedom of speech, assembly and association, religion, and rights in respect to education. Most rights are formulated for every person, although there are some exceptions. The freedom of speech, assembly and association for example, is formulated for citizens of Singapore, and also the liberty of a person is restricted to citizens under certain conditions (Article 9(5)). Minorities and the special position of Malays are addressed in the general provisions of Part XIII.

Furthermore, a number of the rights are restricted. Again, Article 9 notes that it does not invalidate any law “(a) in force before the commencement of this Constitution which authorises the arrest and detention of any person in the interests of public safety, peace and good order or, (b) relating to the misuse of drugs or intoxicating substances which authorises the arrest and detention of any person for the purpose of treatment and rehabilitation”. Discrimination against Singaporean citizens based on religion, race, descent, place of birth is allowed when expressly authorised (Article 12(2)). The freedom of movement and to right to reside is furthermore subject to any law relating to the security of Singapore, public order, public health or the punishment of offenders (Article 13(2)). The freedom of

⁸⁷ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 151.

⁸⁸ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 152.

⁸⁹ The Constitution of Singapore, 9 August 1965, <<https://sso.agc.gov.sg/Act/CONS1963>> last accessed 11 September 2018.

speech, assembly and association may be restricted on a number of grounds by law by Parliament (Article 14(2)), including the security of Singapore, public order or morality. Article 16 on the rights in respect of education, includes the phrase that “no person shall be required to receive instruction in or take part in any ceremony or act of worship of a religion other than its own” (sub 3) and that for the purpose of this clause, the parent or guardian decides the religion of a person under the age of 18(4)).

Finally, Singapore also includes special powers against subversion and emergency powers (Part XII). According to Article 149, Acts do not have to be consistent with Articles 9, 11, 12, 13 or 14. Restrictions on preventive detention are enshrined in Article 151. Emergency powers are also included in Article 150 in case the security or economic life is threatened and can contradict the Constitution, with the exceptions of provisions which relate to religion, citizenship or language (Article 150(5)).

3.10 Thailand

This State is with the exception of the southern Islamic states, relatively homogeneous. It is the only ASEAN nation that was not colonised, although under King Mongkut (1851-68) a number of treaties with Western colonisers were signed that reduced the legal power of Thailand. Furthermore, a part of the Thai territory under King Chulalongkorn was transferred to what now is Laos, Cambodia and Malaysia under pressure of Western colonisers.⁹⁰ Under King Vajiravudh (1910-25) the adage “Nation, Religion (Buddhism) and King” was introduced, which is still used today.⁹¹ Currently, the king has a constitutional status. Before and during the initial years of ASEAN Thailand, which was one of its founders, experienced an authoritarian rule (1948-1973).⁹² With a short intermezzo of authoritarian rule in 1976, Thailand was developing into a democracy from 1973 onwards, but experienced a number of military coups along the way.⁹³ In the most recent ones took place in 2006⁹⁴ and 2014⁹⁵, and in between, a major clash took place between

⁹⁰ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 164-165.

⁹¹ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 167.

⁹² Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 169-171.

⁹³ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp. 172-173.

⁹⁴ —, ‘Thai PM deposed Military Coup’ *BBC News* (last updated 20 September 2006) <<http://news.bbc.co.uk/2/hi/5361512.stm>> last accessed 11 September 2018.

⁹⁵ —, ‘Thailand Military seizes Power in Coup’ *BBC News* (22 May 2014) <<http://www.bbc.com/news/world-asia-27517591>> last accessed 11 September 2018.

pro- and anti-Thaksin supporters and the military in 2010.⁹⁶ Change came for Thailand's constitutional monarchy, and a suspension of the 2007 Constitution followed the 2014 coup d'état.

The Constitution was subject to numerous amendments and changes of constitutions. On 7 August 2016, a constitutional referendum was held. While the charter only offers semi-democracy, the majority of Thai people backed the charter.⁹⁷ On 6 April 2017, the new constitution was promulgated by the King.⁹⁸

The preamble refers to the rights and liberties of Thai people, whereby restrictions and limitations thereon are considered exceptions. Human dignity, rights, liberty and equality are included in the general provisions (Article 4). Chapter III lists the rights and liberties of the Thai people, while Chapter IV lists their duties. As the titles of these two Chapters are explicitly mentioning Thai people, the human rights appear to be restricted to Thai nationals only. Nevertheless, the provisions use wordings like 'all persons', 'a person', 'every person' or 'no person'. The exercise of the rights or liberties are restricted in case the security of the State or public order or good morals are affected or endangered, or in case the rights or liberties of other persons are violated (section 25).

Specifically, Chapter III includes the following topics, whereby a number of these rights are subject to limitations: conditions for the enactment of law, non-discrimination, the right to life, the prohibition of unlawful arrest and detention, torture, brutal acts and cruel or inhumane punishment, the right to a fair trial and related rights, the prohibition of forced labour, the freedom of religion, the right to privacy, dignity, reputation and family, the liberty of dwelling, the freedom of expression and academic freedom, the right to disseminate information and the prohibition of censorship, freedom of communication, the right to property and succession, the right to travel and to reside, the prohibition to be deported or be denied entrance in Thailand, occupation, access to information, the right to petition or take legal action, freedom of association and assembly, the right to conserve and revive culture and traditions, natural resources and the environment, community welfare, the right to form political parties, consumer rights, public health, rights of mothers and people in need, and the prohibition to overthrow the democratic regime.

The duties listed in Chapter IV concern the duty to uphold the nation, religions, the King and democratic government, to defend the country, maintain national interests and to obey the law, enrol in compulsory education, to serve in armed forces, respect the rights and liberties of others, to exercise one's right to vote, to

⁹⁶ Dan Divers, Sara Ridner, Kocha Olarn Lateef Mungin and Miranda Leisinger, 'Bangkok like War Zone as Military cracks down on Protesters' *CNN* (20 May 2010) <<http://edition.cnn.com/2010/WORLD/asiapcf/05/19/thailand.protests/>> last accessed 11 September 2018.

⁹⁷ Jonathan Head, 'Thai Referendum: Why Thais backed a Military-Backed Constitution' *BBC News* (9 August 2016) <<http://www.bbc.com/news/world-asia-37013950>> last accessed 11 September 2018.

⁹⁸ Constitution of the Kingdom of Thailand, 6 April 2018, unofficial translation, <<http://www.thaibossy.org/doha/contents/files/news-20170417-203812-158174.pdf>>, last accessed 19 November 2018>.

cooperate and support the conservation and protection of the environment, natural resources, biodiversity, and cultural heritage, pay taxes, and to not commit or support dishonest acts and wrongful conduct.

The duties of the State (Chapter V) focus on the following topics: the protection of Thailand, observing and enforcing the law, education, care and development of children, public health, basic public utility services, culture and traditions, the environment, access to information, communication, consumer rights, and the financial and fiscal status of Thailand.

Other human rights related topics are visible throughout the document, such as access to justice (section 68), the protection of ethnic groups (section 70), the family as basic element of society, housing, health, and providing assistance to vulnerable groups (section 71), the right to land (section 72), labour (section 74). Access to justice is guaranteed in case a person's rights or liberties are violated (Section 25). Section 213 stipulates that a person whose rights or liberties as guaranteed in the Constitution are violated, has the right to submit a petition to the Constitutional Court.

3.11 Vietnam

Vietnam is an initially Confucian oriented ASEAN Member State ruled by the Communist Party. While being a socialist state on paper, the country also leaves room for a free-enterprise economy.⁹⁹ Vietnam was formerly colonised by the French, while Japan entered during the Second World War. After the War, the country experienced Chinese and French rule, a division in Democratic Republic of Vietnam and the Republic of Vietnam and the Vietnam War.¹⁰⁰ In 1995, Vietnam became ASEAN's seventh Member State.¹⁰¹ The turn of the millennium also marked developments in the field of the rule of law, accountability and the freedom of expression.¹⁰²

Stating that Vietnam is "a socialist rule of law State of the people, by the people, for the people" (Article 2), the 2013 Constitution¹⁰³ lists human rights and citizens' fundamental rights and duties in Chapter 2. It is explicitly stated that both civil and

⁹⁹ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 197.

¹⁰⁰ Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), pp.186-194.

¹⁰¹ ASEAN Ministers of Foreign Affairs, *Declaration of the Admission of the Socialist Republic of Viet Nam into the Association of Southeast Asian Nations*, Bandar Seri Begawan, 28 July 1995, <<http://arc-agreement.asean.org/file/doc/2015/01/declaration-on-the-admission-of-the-socialist-republic-of-vietnam-into-the-association-of-southeast-asian-nations.pdf>> last accessed 11 September 2018.

¹⁰² Peter Church (ed), *A Short History of South-East Asia* (5th edn, John Wiley & Sons, Singapore 2009), p. 197.

¹⁰³ The Constitution of the Socialist Republic of Vietnam, adopted on 28 November 2013, entered into force on 1 January 2014, unofficial translation from Vietnamese by International IDEA, <http://www.constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf> last accessed 11 September 2018.

political rights and economic, social and cultural rights are respected, but also that rights can be restricted by law for reasons of national defence, national security, social order and safety, social morality and community well-being (Article 14). In addition, the rights are inseparable from duties (Article 15). In this sense, both the State and its citizens have duties towards each other.

Specifically, Chapter 2 refers to equality and non-discrimination, the prohibition to be extradited or expelled, the protection of Vietnamese citizens residing abroad, the right to life, the inviolability of his or her body and to the protection by law of his or her health, honour and dignity, the protection against torture, violence, coercion, corporal punishment or other harmful treatment, the prohibition of unlawful arrest and the right to donate human tissue or organs, the right to privacy and correspondence and the protection of one's honour and prestige, the right to a legal residence and inviolability of one's home, freedom of movement, travel and residence, the freedom of belief and religion (including the right not to believe), freedom of speech, press, access to information, assembly, association and demonstration, gender equality and the creation of conditions for the advancement of women, the right to vote and to be elected, citizens participation, the right to lodge complaints or denunciations about illegal acts of others, the principle of presumed innocent and rights to a fair trial, the right to ownership, freedom of enterprise, the right to social security, work and labour protection, the right to marry and divorce, the right to healthcare and protection, the right to conduct research, or engage in literary or artistic creation, rights on cultural heritage, nationality and language.

Furthermore, specific attention is paid to children and the elderly (Article 37). Also striking is that citizens have the right as well as the obligation to learn (Article 39), and have the right to a clean environment as well as the duty to protect it (Article 43). They also have an obligation to display loyalty to and to defend their Fatherland (Article 44 and 45). Alongside obeying the constitution and the law, they must also join in the safeguarding of national security, social order, and safety (Article 46). The duty to pay taxes is also included (Article 47). Article 48 deals with the duty and protection of foreigners and Article 49 with asylum. In other parts of the constitution human rights related provisions are included, such as the notion that the State acknowledges, respects and guarantees human rights and citizens' rights (Article 3) and non-discrimination and the rights of ethnic groups (Article 5). Chapter 3 entitled 'economy, society, culture education, science technology and environment deals with topics more closely, such as workers' rights, health, and education,

Article 102 determines that the People's Courts must safeguard, amongst others, human rights, citizens' rights, and the rights and legitimate interests of organisations and individuals, whereas Article 103 determines the independence during trials and guarantees the rights of the accused or defendants to a defence and the right of involved parties to protect their legitimate interests. Nevertheless, Human Rights Watch uttered the critique that fair and impartial trials are still not

guaranteed, as Articles 70, 88, and 105 allow a continued Communist Party control of the judiciary.¹⁰⁴ Vietnam also refers to the principles of State sovereignty and non-interference.

3.12 Patterns in the codification of fundamental rights in the Constitutions of the ASEAN Member States

Given the fundamental rights as included in the different constitutions, these documents show that the initial idea that human rights are mainly a Western undertaking is unfounded and out-dated. The constitutions of the Member States include civil and political rights, economic, social, and cultural rights and aspects of third generation rights, which are also characterised as ‘solidarity rights and “promote the idea of collective or peoples’ rights”’.¹⁰⁵ Examples are the right to self-determination, development, and a clean and healthy environment. The inclusion of such rights can be explained as the ‘first wave’ of third generation rights (such as the rights to self-determination and development) were considered as a reaction to colonialism and the experience of imperialism.¹⁰⁶ The ‘second wave’ of third generation rights, such as the right to a clean and healthy environment, were based on ideologies which were previously not visible within international human rights law’.¹⁰⁷ Rosa Freedman further observed that “[i]n many ways, the subjects of these newer rights are unclear, arguably owing to the focus being on responsibilities rather than rights. As such, Third Generation Rights have markedly expanded the subjects of rights.”¹⁰⁸ In this respect, third generation rights have expanded the subjects of rights from individuals to peoples, and also on States.¹⁰⁹

This section highlights human rights-oriented provisions in the constitutions of ASEAN Member States. In this way, formal commonalities and differences are discovered, which may have implications for ASEAN’s human rights system.

¹⁰⁴ —, Vietnam: Amended Constitution a Missed Opportunity on Rights. New UN Human Rights Council Member Not Living Up to Commitments, *Human Rights Watch* (2 December 2013) <<https://www.hrw.org/news/2013/12/02/vietnam-amended-constitution-missed-opportunity-rights>> last accessed 11 September 2018.

¹⁰⁵ Rosa Freedman, ‘Third Generation Rights: Is There Room for Hybrid Constructs within International Human Rights Law?’ (2013) 2 *Cambridge Journal of International and Comparative Law* 935, p. 952.

¹⁰⁶ Rosa Freedman, ‘Third Generation Rights: Is There Room for Hybrid Constructs within International Human Rights Law?’ (2013) 2 *Cambridge Journal of International and Comparative Law* 935, p. 947.

¹⁰⁷ Rosa Freedman, ‘Third Generation Rights: Is There Room for Hybrid Constructs within International Human Rights Law?’ (2013) 2 *Cambridge Journal of International and Comparative Law* 935, p. 948.

¹⁰⁸ Rosa Freedman, ‘Third Generation Rights: Is There Room for Hybrid Constructs within International Human Rights Law?’ (2013) 2 *Cambridge Journal of International and Comparative Law* 935, p. 952.

¹⁰⁹ Rosa Freedman, ‘Third Generation Rights: Is There Room for Hybrid Constructs within International Human Rights Law?’ (2013) 2 *Cambridge Journal of International and Comparative Law* 935, p. 953.

Wiratraman and Syafaat mapped the common ground in human rights among the ASEAN Member States. Their observations are complemented with the findings in the previous Subsections and of a research report of the American Bar Association¹¹⁰ and are included in the table in Annex 2.

In line with the research of Wiratraman and Syafaat, it can be concluded that that certain human rights that are generally protected at the international level are absent¹¹¹ or missing in a number of constitutions. Specifically, the rights of LGBTIs and the right and protection of migrant workers and their families appear to be missing, while from Table 2 also follows that not all States include the norms which are accepted as *ius cogens* norms. Furthermore, the right to a nationality, to asylum and the right to rest and leisure are examples of rights that are included by only a limited number of ASEAN Member States.

The Member States that have Islam as their national religion interpret the freedom of religion in a narrow sense. The case of Malaysian national Lina Joy is in this respect illustrative. Although the verdict of the Federal Court dates from 2007, it illustrates the position of an ASEAN Member State towards the freedom of religion. It also makes clear how the influence of national law can lower the universal standard on the freedom of religion. In this case, Lina Joy, a Malay woman, converted from Islam to Christianity. She wanted to have this conversion legally recognised by the authorities in order to be able to marry her Christian fiancé. This change had to be performed in accordance with Sharia law, but apostasy is not allowed in Islam. Therefore, she went directly to Malaysia's High Court and Federal Court, but her claim was rejected as she had to renounce her religion according to the existing laws and practices of that religion. The Federal Court decided that one's religion can only be renounced according to the laws or practices of the particular religion and that "a person cannot, at one's whims and fancies renounce or embrace a religion".¹¹² In other words, for the rights to

¹¹⁰ R. Herlambang Perdana Wiratraman and Ali Syafaat, *Constitutionalism and the Declaration of ASEAN Human Rights* (Human Rights Working Group, Jakarta 2011) and American Bar Association, *The ASEAN Human Rights Declaration: A Legal Analysis* (American Bar Association Rule of Law Initiative 2014).

¹¹¹ R. Herlambang Perdana Wiratraman and Ali Syafaat, *Constitutionalism and the Declaration of ASEAN Human Rights* (Human Rights Working Group, Jakarta 2011), p. 45.

¹¹² Chief Justice Tun Ahmad Fairuz Sheikh Abdul Halim, quoted in —, 'Lina Joy loses Appeal to drop 'Islam' from her NRIC' *The Sun Daily* (Putrajaya, 31 May 2007) <<http://www.thesundaily.my/node/170212>> last accessed 11 September 2018. Justice Datuk Alauddin Mohd Sheriff dismissed the appeal of Lina Joy and Justice Datuk Richard Malanjum dissented; see 'Lina Joy Case: Dissenting Judgment of Justice Richard Malanjum', posted on the website of the Malaysian Bar, 30 May 2007, <http://www.malaysianbar.org.my/selected_judgements/lina_joy_case_dissenting_judgment_of_justice_richard_malanjum.html> last accessed 11 September 2018. Under Malaysian law apostasy is considered a crime. Muslims who want to renounce their religion risk jail sentences and fines. In addition, because Lina Joy's religion was not legally recognised, she could not marry her Christian partner. The case received critique came from numerous NGOs and international media coverage. See for example Forum Asia, 'Malaysia, No Joy for Lina' *Forum Asia* (12 June 2007), <<https://www.forum-asia.org/?p=5556>> last accessed 11 September 2018. On Islam and the change of

materialise, secular law has to be complemented by the religious laws and practices as well. Neo, however, has rightly pointed out that the freedom to have or to adopt a religion “necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief”.¹¹³

Recently, Malaysia was again criticised for its interpretation of Islam that affected human rights, in this case the rights of two lesbian women. In August 2018, two women were charged under Islamic Sharia law and convicted for attempting to have lesbian sex. Their sentence was six strokes of caning and a fine after they pleaded guilty. It is said that this sentence comes amid growing intolerance to the LGBTI community in Malaysia¹¹⁴ and was amongst others condemned by SUHAKAM.¹¹⁵

Wiratraman and Syafaat also observed that the rights covering women (including pregnant women), rights of the poor, the prohibition of forced labour and slavery and the protection of the elderly are brought forward as rights “typical of ASEAN States”, although the nuance should be made that the prohibition of slavery and forced labour are norms of *ius cogens*. In addition, the other vulnerable groups are also protected through international law.

Comparing the wording in the preamble of the constitutions of each Member State, Wiratraman and Syafaat have identified the following common human rights values namely, (i) peace, (ii) freedom as the right of all Nations, (iii) freedom, social justice and citizen’s rights, (iv) equality and non-discrimination, and (v) democracy. These common values are all included in the ASEAN Charter and the AHRD, which are analysed in the next chapters. They also categorised the constitutions of the ASEAN Member States into three categories: (i) constitutions that provide extensive human rights guarantees, (ii) constitutions that give human rights guarantees but with numerous restrictions and (iii) constitutions that give limited human rights guarantees. In line with this, the authors come to the classification:

- i) Cambodia, Indonesia, Laos, the Philippines and Thailand;
- ii) Malaysia, Myanmar, Vietnam and Singapore;
- iii) Brunei Darussalam.

one’s religion, see for instance Abdullahi An-Na’im, ‘Human Rights in the Arab World: A Regional Perspective’ (2001) 23 *Human Rights Quarterly* 701.

¹¹³ Jaclyn L. Neo, ‘Religious Freedom and the ASEAN Human Rights Declaration: Prospects and Challenges’ (2016) 14 (4) *The Review of Faith & International Affairs* 1, p. 3 and UN Human Rights Committee, General Comment 22 on ‘The Right to Freedom of Thought, Conscience and Religion (Article 18)’ of 30 July 1993, UN Doc. CCPR/C/21/Rev.1/Add.4 The author also addresses difficulties of the freedom of religion in other ASEAN Member States in this article.

¹¹⁴ Thomson Reuters Foundation, ‘Malaysian women to be caned for ‘attempting lesbian sex’ *Bangkok Post* (14 August 2018) <<https://www.bangkokpost.com/news/asean/1521538/malaysian-women-to-be-caned-for-attempting-lesbian-sex>> last accessed 25 August 2018.

¹¹⁵ SUHAKAM, ‘Press Statement No. 32 of 2018’ (15 August 2018). <<http://www.suhakam.org.my/press-statement-no-32-of-2018-caning-for-attempted-lesbian-relations/>> last accessed 25 August 2018.

This categorisation differs slightly in terms of the State's position on human rights as generally perceived at ASEAN level, as Indonesia and the Philippines are considered to be forerunners, with Malaysia, Singapore and Thailand forming the middle ground. Cambodia, Laos, Myanmar, Vietnam, and Brunei Darussalam are considered to be the conservative States.¹¹⁶

Another distinction is the subject of these rights. Specifically, a number of the constitutions limit the subjects of the rights for their citizens only, *i.e.* Cambodia, Laos, Myanmar and Vietnam. Other constitutions provide restrictions on certain human rights, that is to say, Indonesia, Malaysia, the Philippines, Singapore, Thailand. Brunei Darussalam is the Member State that is missing in the list, but this State only included one human right in its Constitution.

Consequently, the constitutions provide in various regards, a lower level of protection than the international framework. The notion that every person is a bearer of human rights as accepted at the international level does not seem to hold true in the ASEAN Member States. This does not correspond to the UDHR and the UN instruments, of which a number are signed and ratified or acceded to by ASEAN Member States. This discrepancy poses a challenge to the ASEAN Human Rights Declaration, which forms a bridge between the national and universal legal framework. The following chapter deals with the issue whether the ASEAN Human Rights Declaration lives up to internationally recognised human rights standards, thereby upholding the universal level of the United Nations by connecting human rights with human dignity, or whether it provides a lower level of human rights standards.

Finally, also salient is that some ASEAN Member States included the principle of non-interference in their Constitutions, which is also part of the ASEAN Way since the beginning of the organisation's existence (see Section 3.2 of Chapter IV).

4 NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASEAN REGION

4.1 Introduction

In the previous sections, the status of core UN human rights conventions and fundamental rights as enshrined in the Member States' constitutions were analysed. This analysis unveiled the positions of ASEAN Member States towards human rights.

With respect to the procedural aspects of ASEAN's human rights system, it is relevant to examine the mandate of the existing human rights mechanisms in the ASEAN region, as they could complement ASEAN's human rights mechanisms.

¹¹⁶ Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 112..

Specifically, because the ASEAN Intergovernmental Commission on Human Rights focuses mainly on the promotion of human rights at the expense of a protection mandate, the National Human Rights Institutions could possibly narrow this lacuna. The ASEAN Human Rights Declaration seems to allow a role of the National Human Rights Institutions, as Article 39 states:

ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, inter alia, cooperation with one another as well as with relevant national, regional, and international institutions/organisations, in accordance with the ASEAN Charter.

The National Human Rights Institutions (NHRIs) of three ASEAN Member States are accredited with the A-status, meaning that they are in full compliance with the Paris Principles.¹¹⁷ These principles list a number of responsibilities for NHRIs that are categorised under the following headings: competence and responsibilities, composition and guarantees of independence and pluralism, methods of operation, and additional principles concerning the status of commissions with quasi-jurisdictional competence.¹¹⁸ The three Institutions which are accredited with the A-status are Indonesia's Komisi Nasional Hak Asasi Manusia (Komnas HAM), Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM) and the Commission on Human Rights of the Philippines (CHR).

The National Human Rights Commission of Thailand (NHRCT) was downgraded to a B-status in October 2014 and was given one year to once again comply with the Paris Principles. The Thai Institution was given a B-status in November 2015. The Myanmar Human Rights Commission (MHRC) was established one month after Tomas Ojea Quintana (UN Special Rapporteur for Human Rights in Burma) called for a national human rights body,¹¹⁹ and is also accredited with a B-status. The NHRI of Thailand and Myanmar are, therefore, omitted from this study. East Timor, which has ambitions to become an ASEAN

¹¹⁷ Global Alliance of National Human Rights Institutions, 'Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions', accreditation status as of 25 May 2017, <http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf> last accessed 11 September 2018.

¹¹⁸ UN General Assembly Resolution 48/134 (*Principles relating to the Status of National Institutions (The Paris Principles)*), UN Doc. A/Res/48/134, 20 December 1993.

¹¹⁹ Established on 5 September 2011, but has been heavily criticised as an empty gesture, being mainly a window dressing initiative. Significant challenges are amongst others faced in terms of compliance with the Paris Principles, especially the Commission's independence, and the Commission's avoidance to investigate complaints in 'conflict areas'; see for example —, 'Burma sets up Human Rights Commission', *BBC News* (6 September 2011) <<http://www.bbc.co.uk/news/world-asia-pacific-14807362>> last accessed 11 September 2018, Patrick Winn, 'A Human Rights Commission's Shaky Rise in Burma/Myanmar' *Public Radio International* (9 March 2012) <<http://www.globalpost.com/globalpost-blogs/southeast-asia/win-mra-myanmar-human-rights>> last accessed 11 September 2018 and Charlie Cambell, 'Empowering the Myanmar Human Rights Commission' *The Irrawaddy* (9 May 2012) <<http://www.irrawaddy.org/archives/3860>> last accessed 11 September 2018.

Member State¹²⁰ established an Ombudsman for Human Rights and Justice, also known as Provedoria for Human Rights and Justice and is also in line with the Paris Principles. Nevertheless, this Commission also falls outside the scope of the research, as the focus lies on ASEAN and its current Member States.

For the purpose of the procedural aspect of this research on ASEAN's human rights system and its Member States, this section investigates the formal mandates of the three accredited ASEAN National Human Rights Institutions.

It falls outside the scope of the research to measure the actual performance and challenges of each National Human Rights Institution, as this is a research topic in and of itself,¹²¹ although some preliminary remarks have been made after the discussion of the mandate of the NHRIs of Indonesia, Malaysia and the Philippines. Illustrative in this respect was also the cut to the Commission's budget in the Philippines, allocating it a budget of 1,000 Philippine Pesos (around 20 Euros) for the year 2018 during Duterte's ongoing war on drugs,¹²² which the Philippine Congress later restored.¹²³

4.2 Indonesia

Komisi Nasional Hak Asasi Manusia (Komnas HAM) was established by Presidential Decree No. 50/1993 on the National Commission on Human Rights during the Suharto regime on 7 June 1993.¹²⁴ According to Article 3 of this Decree, Komnas HAM is an independent body. Law No. 39/1999 concerning Human Rights

¹²⁰ East Timor joins the ASEAN Regional Forum since 2005, acceded to the Treaty on Amity and Cooperation in 2007 and formally applied for ASEAN Membership in 2011, which led to the start of a feasibility study in the same year and hosted the ASEAN's People Forum in 2016. ASEAN Chairman Rodrigo Duterte stated at the 30th ASEAN Summit (Manila, Philippines, 29 April 2017) that East Timor's application was still under study; Claire Carter, 'East Timor's Accession to ASEAN' *ASEAN Today* (31 August 2017) <<https://www.aseantoday.com/2017/08/east-timors-accession-to-asean/>> last accessed 11 September 2018.

¹²¹ See for example the extensive work of Ken Setiawan on Komnas HAM and SUHAKAM: Ken Setiawan, *Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia*, (Leiden University Press, Leiden 2013), Ken Setiawan, 'From Hope to Disillusion The Paradox of Komnas HAM, the Indonesian National Human Rights Commission' (2016) 172 (1) *Bijdragen tot de Taal-, Land- en Volkenkunde* 1 and Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), chapter 2.

¹²² See for example Red Thaddeus D. Miguel, 'What Price is the Philippines Human Rights Commission Budget Reprieve?' *Health and Human Rights Journal* (1 October 2017) <<https://www.hhrjournal.org/2017/10/what-price-is-the-philippines-human-rights-commission-budget-reprieve/>> last accessed 11 September 2018, and Barney Porter, 'Philippines: Commission on Human Rights Budget cut to Almost Nothing amid Duterte's Drug Crackdown' *ABC* (13 September 2017) <[http://www.abc.net.au/news/2017-09-13/duterte-slashes-commission-on-human-rights-annual-budget-to-\\$25/8941088](http://www.abc.net.au/news/2017-09-13/duterte-slashes-commission-on-human-rights-annual-budget-to-$25/8941088)> last accessed 11 September 2018.

¹²³ Manuel Mogato, 'Philippine Congress agrees to restore rights commission budget from \$20' *Reuters* (Manila, 20 September 2017) <<https://www.reuters.com/article/us-philippines-duterte-rights/philippine-congress-agrees-to-restore-rights-commission-budget-from-20-idUSKCN1BV28J>> last accessed 11 September 2018.

¹²⁴ Indonesia: Presidential Decree No. 50 of 1993 on The National Commission on Human Rights, 7 June 1993, <<http://www.refworld.org/docid/474d2ae22.html>> last accessed 18 August 2018.

is the current legal basis of the Commission. Chapter VII deals with the Commission.¹²⁵

In line with Article 4 of Decree No. 50/1993, the Commission's aims to:

- a. develop conditions conducive to the execution of human rights in accordance with Pancasila, the 1945 Constitution, the United Nations Charter, and the Universal Declaration of Human Rights; and,
- b. improve the protection and upholding of human rights in the interests of the personal development of Indonesian people as a whole and their ability to participate in several aspects of life.¹²⁶

In order to achieve these aims, the Commission is independent and mandated "to study, research, disseminate, monitor and mediate human rights issues" (Article 76(1)). According to Article 89, Komnas HAM is mandated to:

(1) To carry out the functions of the National Commission on Human Rights with realize aims as referred to in Article 76, the National Commission on Human Rights has the authority to:

- a. study and examine international human rights instruments with the aim of providing recommendations concerning their possible accession and ratification;
- b. study and examine legislation in order to provide recommendations concerning drawing up, amending and revoking of legislation concerning human rights;
- c. publish study and examination reports;
- d. carry out literature studies, field studies, and comparative studies with other countries;
- e. discuss issues related to protecting, upholding and promoting human rights; and,
- f. conduct cooperative research and examination into human rights with organizations, institutions or other parties, at regional, national and international levels.

(2) To carry out its function as disseminator as referred to in Article 76, the National Commission on Human Rights is charged with and authorized to:

- a. disseminate information concerning human rights to the Indonesian public;
- b. take steps to raise public awareness about human rights through formal and non-formal education institutes and other bodies;
- c. cooperate with organizations, institutions or other parties at national, regional and international level with to regard human rights;

(3) To carry out its supervisory function as referred to in Article 76, the National Commission on Human Rights is charged with and authorized to:

- a. monitor the execution of human rights and compile reports of the output of this monitoring;
- b. investigate and examine incidents occurring in society which either by their nature or scope likely constitute violations of human rights;

¹²⁵ Indonesia: Act No. 39 of 1999 on Human Rights, 23 September 1999 <<http://www.refworld.org/docid/4da2ce862.html>> accessed 18 August 2018.

¹²⁶ Article 75 Act No. 39/1999.

- c. call on complainants, victims and accused to request and hear their statements;
- d. call on witnesses to request and hear their witness statements, and in the case of prosecution witness to request submission of necessary evidence;
- e. survey incident locations and other locations as deemed necessary;
- f. call on related parties to give written statements or to submit necessary authenticated documents as required upon approval of the Head of Court;
- g. examine houses, yards, buildings, and other places that certain parties reside in or own, upon approval of the Head of Court;
- h. on approval of the Head of Court, provide input into particular cases currently undergoing judicial process if the case involves violation of human rights of public issue and court investigation, and the input of the National Commission on Human Rights shall be made known to the parties by the judge;

(4) To carry out its function as mediator as referred to in Article 76, the National Commission on Human Rights is charged with and authorized to:

- a. arbitrate between the two parties;
- b. resolve cases through consultation, negotiation, mediation, conciliation and expert evaluation;
- c. give recommendations to the parties for resolving conflict through the courts;
- d. submit recommendations concerning cases of human rights violations to the Government in order that their resolution may be followed up on;
- e. submit recommendations concerning cases of human rights violations to the House of Representatives of the Republic of Indonesia for their follow up.¹²⁷

In addition, an individual complaint procedure is possible under Article 90:

- (1) All people and groups of people who have strong grounds that their human rights have been violated may submit an oral or written complaint to the National Commission on Human Rights.
- (2) Complaints will be dealt with only if the true identity of the complainant is made known, and if adequate and clear evidence/statement of the subject matter of the complaint is provided.
- (3) In the case in which a complaint is made by a third party, the complaint must have the approval of the party whose rights have been violated as victim, with the exception of certain human rights violations as based on the consideration of the National Commission on Human Rights.
- (4) Violation of human rights as referred to in clause (3) also covers complaints made by proxy concerning violation of human rights experienced by the public.

The Act also allows for public participation in Chapter VIII. Articles 101-103 determine that “all people, groups, political organizations, community organizations, and self-reliant organizations and other non-government organizations” have the right to submit reports of human rights violations (Article 101), and to submit proposals on human rights policy (Article 102). Furthermore,

¹²⁷ Article 89, Act No. 39/1999.

these actors together with educational organisations have the right to study, educate and disseminate information on human rights (Article 103).

Finally, the Act also refers to the establishment of a human rights tribunal (Article 104), which was established with Act No. 26 Year 2000 concerning Human Rights Court (Act No. 26/2000).¹²⁸ This Court deals with gross violations of human rights, *i.e.* the crime of genocide and crimes against humanity (Chapter 3 of this Act). Komnas HAM performs the inquiries (Articles 18-20).

Law. No. 40/2008 on the Elimination of Racial and Ethnic Discrimination provided Komnas HAM extra responsibilities in the prevention of racial and ethnic discrimination.

In comparison with the AICHR, Komnas HAM's protection mandate is the most striking difference, specifically its function as supervisor and mediator and the possibility to act upon individual complaints.¹²⁹ Komnas HAM could serve as an example of how to promote and protect human rights in the region. From Komnas HAM's side, cooperation between the two bodies is also possible as it is explicitly mentioned that Komnas HAM can cooperate with other institutions, including at the regional level.

4.3 Malaysia

Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM) is based on the Human Rights Commission of Malaysia Act 1999 (Act No. 597).¹³⁰ The Commission's inauguration took place on 24 April 2000. SUHAKAM deals with issues concerning human rights as included in Part II of the Federal Constitution (discussed above). The UDHR is acknowledged as long as it is not inconsistent with the Federal Constitution (Article 4 (4)). According to SUHAKAM, this means that the UDHR must be considered in the event a right is not mentioned in Part II of the Constitution, on the condition that there is no conflict with the Constitution.¹³¹

According to Article 4 (1) of the Act, SUHAKAM's functions are awareness raising and education, providing advice and assistance to the government on legislation and procedures as well as accession to international instruments, and inquire on its own initiative or on complaints (see also Article 12).

¹²⁸ Act No. 26 of 2000 concerning Human Rights Court (Act No.26/2000), 23 November 2000 <<https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/B30917E8E5443532C1257D90004DC6C5/TEXT/Indonesia%20-%20Act%20on%20the%20Human%20Rights%20Courts,%202000%20%5BEng%5D.pdf>>. last accessed 11 September 2018.

¹²⁹ See for more information on Komnas HAM (in Indonesian) <<http://www.komnasham.go.id>> last accessed 11 September 2018.

¹³⁰ Available at SUHAKAM's website SUHAKAM, 'The Official Portal of Human Rights Commission of Malaysia' <<http://www.suhakam.org.my/home>> last accessed 11 September 2018. SUHAKAM underwent revisions in 2009 with *Human Rights Commission of Malaysia (Amendment) Act 2009 (Act A1353)*, 2009 and *Human Rights Commission of Malaysia (Amendment) (Amendment) Act 2009 (Act A1357)*, 2009, also available on SUHAKAM's website.

¹³¹ SUHAKAM, 'Functions & Power' <<http://www.suhakam.org.my/about-suhakam/fungsi-kuasa/>> last accessed 11 September 2018.

Article 4 (2) further expounds on the mandate:

- (a) to promote awareness of human rights and to undertake research by conducting programmes, seminars and workshops and to disseminate and distribute the results of such research;
- (b) to advise the Government and/or the relevant authorities of complaints against such authorities and recommend to the Government and/or such authorities appropriate measures to be taken;
- (c) to study and verify any infringement of human rights in accordance with the provisions of this Act;
- (d) to visit places of detention in accordance with procedures as prescribed by the laws relating to the places of detention and to make necessary recommendations;
- (e) to issue public statement on human rights as and when necessary; and
- (f) to undertake any other appropriate activities as are necessary in accordance with the written laws in force, if any, in relation to such activities.¹³²

In the event of an infringement, the Commission can issue recommendations and refer the issue to the relevant authority or person (Article 13 (2)).

Regarding the powers of inquiry, Article 12 stipulates that SUHAKAM can act upon its own initiative or complaint of (a representative of) a person or groups of persons:

The Commission shall, for the purposes of an inquiry under this Act, have the power:

- (a) to procure and receive all such evidence, written or oral, and to examine all such persons as witnesses, as the Commission thinks necessary or desirable to procure or examine;
- (b) to require that the evidence, whether written or oral, of any witness be given on oath or affirmation, such oath or affirmation being that which could be required of the witness if he were giving evidence in a court of law, and to administer or cause to be administered by an officer authorized in that behalf by the Commission an oath or affirmation to every such witness;
- (c) to summon any person residing in Malaysia to attend any meeting of the Commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession;
- (d) to admit notwithstanding any of the provisions of the Evidence Act 1950 [Act 56], any evidence, whether written or oral, which may be inadmissible in civil or criminal proceedings; and
- (e) to admit or exclude the public from such inquiry or any part thereof.¹³³

Finally, SUHAKAM adopted a Charter, in which its core values are stated. These values are respect, independence, integrity, engagements, efficiency,

¹³² Article 4 (2) Human Rights Commission of Malaysia Act 1999 (Act No. 597).

¹³³ Article 14 (1) Human Rights Commission of Malaysia Act 1999 (Act No. 597).

openness, and capacity development.¹³⁴ This translates, for example, into posting the reports of the public inquiry on SUHAKAM's website. Alongside the powers of inquiry, which can form an example to the AICHR, the values of independence, engagement and openness are especially advisable to the AICHR. In this way, its legitimacy could be increased.

4.4 The Philippines

The creation of the Commission on Human Rights of the Philippines (CHR) is enshrined in the Constitution (Article XIII, Sections 17-19)¹³⁵ and established by Executive Order No. 163,¹³⁶ making it the only NHRI in ASEAN that predates the 1993 World Conference. Reiterating the Constitution, the mandate of the Commission is as follows:

- (1) Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;
- (2) Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court.
- (3) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the under-privileged whose human rights have been violated or need protection;
- (4) Exercise visitorial powers over jails, prisons, or detention facilities;
- (5) Establish a continuing program of research, education, and information to enhance respect for the privacy of human rights;
- (6) Recommend to the Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families;
- (7) Monitor the Philippine Government's compliance with international treaty obligations on human rights;
- (8) Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;
- (9) Request the assistance of any department, bureau, office, or agency in the performance of its functions;
- (10) Appoint its officers and employees in accordance with law; and
- (11) Perform such other duties and functions as may be provided by law.¹³⁷

¹³⁴ SUHAKAM, *Charter Human Rights Commission of Malaysia (SUHAKAM)* <<http://www.suhakam.org.my/about-suhakam/piagam-suhakam/>> last accessed 11 September 2018.

¹³⁵ The Constitution of the Republic of the Philippines 2 February 1987, Official Gazette <<http://www.officialgazette.gov.ph/constitutions/1987-constitution/>> last accessed 11 September 2018.

¹³⁶ Executive Order No. 163 - Declaring the Effectivity of the Creation of the Commission on Human Rights as provided for in the 1987 Constitution, providing Guidelines for the Operation thereof and for other Proposes, 1987, <<http://hrlibrary.umn.edu/research/Philippines/Exec.%20Order%20165%20-%20Order%20Creating%20the%20CHR.pdf>> last accessed 11 September 2018.

¹³⁷ Section 18, Constitution and Section 3, Executive Order No. 163.

Finally, Section 19 stipulates that “[t]he Congress may provide for other cases of violations of human rights that should fall within the authority of the Commission, taking into account its recommendations.”

In a similar manner to the commissions researched above, investigative powers are also included in the mandate of the CHR. The Philippine commission takes the international level of human rights protection as its reference point, as it monitors its Government’s compliance to international treaty obligations on human rights. This is also advisable to ASEAN. Given the ratification of human rights treaties by all ASEAN Member States, common ground for human rights is able to be identified. As mapped above, this is also true for the common ground in fundamental rights as included in each Constitution. In this way, the human rights can form the focus of the AICHR.

4.5 The protection mandate of the NHRIs

On the basis of the above analysis, it follows that the institutions are impartial and mandated to both promote and protect human rights. Muntarbhorn furthermore argued that it is key that these NHRIs can “receive complaints, investigate and make recommendations with a view to remedies. A new trend is to enable them to have quasi-judicial powers and to cross-refer cases to the court for binding decisions. Meanwhile, the ASEAN regional bodies are without such powers”.¹³⁸

Consequently, the three NHRIs might narrow the lacuna with respect to the protection mandate of the ASEAN Intergovernmental Commission on Human Rights, as nationals from Indonesia, Malaysia and the Philippines can go their respective National Human Rights Institution. James Gomez and Robin Ramcharan researched this possibility. They distinguished the following elements as critical for human rights protection:

- 1) The capacity of NHRI’s to investigate allegations of violations, to conduct credible hearings on the same and to publicize these for public consumption; and 2) To secure remedies for victims of violations.¹³⁹

According to the authors, the NHRIs in the ASEAN region (*i.e.* including the commission of Myanmar and Thailand):

- 1) NHRIs are dependent on the political climate in each state; 2) Their quasi-judicial investigative processes are lacking in the follow-through that is necessary for the advancement of justice, not only for the parties in individual cases but more generally for the advancement of human rights consistent with international human

¹³⁸ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 173.

¹³⁹ James Gomez and Robin Ramcharan, ‘The “Protection” Capacity of National Human Rights Institutions in Southeast Asia’ (2016) 172 *SEARC Working Paper Series*, p. 4.

rights standards; and 3) They do not seem to be capable of securing remedies or advancing this cause for victims of violations of rights.¹⁴⁰

With respect to the follow-through, they argued that the NHRIs are unable, and maybe also unwilling, and that “their contribution to providing redress and remedies remains at best aspirational”.¹⁴¹

5 CONCLUSION

This chapter shows that human rights are endorsed in different ways in the ASEAN region. These endorsements provide an indication for the common ground among the ASEAN Member States as well as the lack thereof, both in terms of content as well as procedural aspects.

With respect to the UN human rights conventions to which the ASEAN Member States are party, the following observations can be made.

First of all, except for CEDAW, CRC and CRPD and some of the Optional Protocols, the number of ASEAN Member States that has acceded to or ratified the Conventions remains limited. When looking at the overall picture, one can conclude that Cambodia, Indonesia, the Philippines, and Thailand are at the forefront when it comes to becoming party to UN human rights conventions. They are party to at least ten of the instruments discussed. Laos and Vietnam form the middle ground each being party to nine instruments, and Brunei Darussalam, Malaysia, Myanmar, and Singapore with the least number of ratified instruments (namely 5 instruments). Consequently, with respect to the level of ‘concepts’, it could be concluded that not all human rights standards are recognised by the ASEAN Member States. This, in turn, detracts from the universality of human rights at this level.

Furthermore, the ratification of and accession to CEDAW, CRC and CRPD corresponds to the acceptance of these human rights topics at ASEAN level, as Chapter V of this study will illustrate. However, although CEDAW and CRC have been accepted by all States, they are subject to a large number of reservations and declarations.

When comparing the reservations and declarations made by the ASEAN Member States to the core human rights conventions, it is noticeable that a number of the provisions are subjected to national constitutions, legislation, regulations and local customs, values and religions. The principles of sovereignty and territorial integrity of States are also stressed.

In a number of declarations and reservations, ASEAN Member States have stressed relativistic ideas on certain aspects of the conventions, although some reservations were withdrawn. As such reservations reflect a relativistic background,

¹⁴⁰ James Gomez and Robin Ramcharan, ‘The “Protection” Capacity of National Human Rights Institutions in Southeast Asia’ (2016) 172 *SEARC Working Paper Series*, p. 4.

¹⁴¹ James Gomez and Robin Ramcharan, ‘The “Protection” Capacity of National Human Rights Institutions in Southeast Asia’ (2016) 172 *SEARC Working Paper Series*, p. 19.

withdrawing them could indicate a move towards the acceptance of the universality of human rights. Due to their often-general nature, these declarations and reservations do not clarify what is meant by ‘national particularities’. Consequently, they only provide a limited insight into the national particularities, as it becomes clear that certain human rights are subjected to national law. The content of the relativistic attitudes, in the past partly stressed as Asian values by some ASEAN Member States, is not clearly visible. The ASEAN Member States are not party to a number of core UN human rights conventions, which unveils a certain reluctance to adhere to international human rights standards. In addition, while literature suggests that Asian States (including Southeast Asian states) tend to focus on economic, social and cultural rights rather than civil and political rights, this is not backed up by the number of ratifications of the ICCPR and the ICESCR.

Moreover, it is argued that these generally formulated declarations and reservations are not permitted according to Article 19(c) Vienna Convention on the Law of Treaties because they are incompatible with the object and purpose of the convention. In addition, it is argued that these declarations and reservations breach Article 27 Vienna Convention, in which it is stated that a State Party cannot invoke provisions of national law as a justification for its failure to comply with its obligations under a treaty. These notions are part of customary international law and are general principles of international law. Consequently, by formulating such declarations and reservations, Brunei Darussalam, Laos, Malaysia, Myanmar, Singapore and Thailand are lowering the standards that have been set by the international human rights conventions and thus contradicting the universality of human rights at the level of ‘conceptions’.

Regarding the procedural aspects, it is striking that a significant number of the ASEAN Member States do not consider themselves to be bound by provisions on the automatic arbitration and dispute settlement by the ICJ. In addition, the competence of the committees formulated in the various human rights instruments is in general not recognised. The optional protocols on the competence of the committees to receive and consider communications from individuals are in general also not endorsed. This overall tendency seems to correspond with the ASEAN Way (see the following chapter), and the principle of non-interference in particular and negatively affects the universality of human rights at the level of ‘implementation’.

At the level of fundamental rights in each ASEAN Member State, the following observations can be made.

Firstly, diverging viewpoints on non-derogable rights are noticeable. For instance, Indonesia includes a list of non-derogable rights, whereas Myanmar omits human rights that are considered as *ius cogens* norms in its constitution, or formulates restrictions to these rights (for instance, on the prohibition of forced labour). Duties, alongside fundamental rights, and specific vulnerable groups are also included. On the other hand, a number of rights are missing at this level. The rights of LGBTIs and the right and protection of migrant workers and their families

appear to be missing. Furthermore, the right to a nationality, to asylum and the right to rest and leisure are examples of rights that are included by only a limited number of ASEAN Member States. Overall, one can conclude that all ASEAN Member States share words and concepts, such as peace, freedom, the rights of all nations, social justice and citizen's rights, equality and non-discrimination, and democracy.

Salient is that the subject of human rights is restricted in many constitutions. The notion that human rights are intrinsic to being human does not seem to apply. Referring to duties is another form of restricting human rights; one has duties within one's family, towards the society and the State. In practice, rights imply responsibilities as they can conflict with the rights of others. Nevertheless, the list of duties included in the constitutions is generally longer and sometimes alien to Western, or at least European, States.

Despite critique on the NHRIs mandate that exist in the ASEAN region, the NHRIs of Indonesia, Malaysia and the Philippines are in line with the Paris Principles, which makes that these NHRIs contribute to the universality of human rights at the level of 'implementation'. Their mandate is overall broader than the mandate of the ASEAN Intergovernmental Commission on Human Rights (discussed in Chapter V). For example, the inquiry role is present in all four NHRIs, which can act upon their own initiative or a complaint. Other elements which are visible in the NHRIs and that could benefit the AICHR's accountability and legitimacy are independence, engagement, openness and reference to the international human rights standards.

CHAPTER IV

UNDERSTANDING ASEAN AS CARRIER OF A SPECIFIC HUMAN RIGHTS SYSTEM

1 INTRODUCTION

The Southeast Asian region experienced different initiatives for regional cooperation after the end of the Second World War. In the aftermath of the region's colonial times, Southeast Asia was subject to foreign influences. Furthermore, supporters and opponents of the United States of America and of Southeast Asian regionalism were divided. Yet, initiatives for regional cooperation, albeit encompassing a broader geographical scope and in one case taken under the auspices of the UN (in the form of UNECAFE),¹ were taken in different forms.

The Colombo Plan for Economic Cooperative and Social Development in Asia and the Pacific, which resulted from the Commonwealth Conference of Foreign Affairs (Colombo, January 1950), was established on 1 July 1951 and formed one of the early initiatives. The Southeast Treaty Organization (SEATO), which aimed at collective defence and blocking communism in Southeast Asia, was established on 19 February 1955, but dissolved on 30 June 1977.

Malaysia, the Philippines, Thailand and later also Indonesia became important actors in the region's regionalism. The Association of Southeast Asia (ASA), which was founded in 1961, but ceased to exist just after the establishment of ASEAN, for instance consisted of Malaysia, the Philippines and Thailand. MAPHILINDO, which brought together Malaysia, the Philippines and Indonesia, was replaced by ASEAN. At that time, the Cold War affected the region, and the region was divided in pro- and anti-communist States. A number of like-minded (non-communist) States established ASEAN. Their main commonalities could be described as fear for communist control and their ambition to form a block against communism, the prospect of economic aid from the United States, the United Kingdom and Japan, and their ambition to regenerate regional cooperation by replacing ASA and

¹ United Nations Economic Commission for Asia and the Far East (UNECAFE) was established by the UN Economic and Social Council (ECOSOC) in 1947 and was the predecessor of UN Economic and Social Commission for Asia and the Pacific (ESCAP).

MAPHILINDO with ASEAN.² The inclusion of Indonesia as one of the organisation's founding Member States contrasts the country's former lack of interest in regional cooperation and the policy of *Konfrontasi* against the British and the then proposed Federation of Malaysia (1963-1965).³

In the years after its establishment, ASEAN expanded in terms of geographical scope, institutions and areas of cooperation. Nowadays, ASEAN geographically reflects almost the entire Southeast Asian region. Given the criteria for membership enumerated in Article 6 of the ASEAN Charter,⁴ States that are eligible for membership are limited. Papua New Guinea has had an observer status since 1976.⁵ East Timor has had an observer status within ASEAN since 2002 and is in the process of becoming a Member State of the organisation, although this process has been cumbersome.⁶

ASEAN is the most suitable candidate to develop a meaningful regional human rights system in the Southeast Asian region. Since the start of this research in 2008, a number of steps have been made in the field of human rights in a rather short period of time. These initiatives include the adoption of the ASEAN Human Rights Declaration that was preceded by the ratification of the ASEAN Charter and the establishment of the ASEAN Intergovernmental Commission on Human Rights.

Institutionally, the ASEAN Intergovernmental Commission on Human Rights, ASEAN's overarching human rights body, the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children, and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers have been established. They are important indicators for the region's progress in developing its human rights system.

Due to the region's historical, political, economic, religious and cultural backgrounds and diversity among the Member States, challenges lie ahead in further developing a meaningful human rights system. Bearing the latest developments in mind, the ambition to develop an appropriate ASEAN human

² Yoshiyuki Hagiwara, 'The Formation of ASEAN', in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (2nd edn, Institute of Southeast Asian Studies, Singapore 2003), p. 19.

³ Peter Lyon, 'Post-War Regional Cooperation' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (Institute of Southeast Asian Studies, Singapore 2003), p. 19.

⁴ Article 6(2) ASEAN Charter enumerates four criteria for membership: (a) location in the recognised geographical region of Southeast Asia; (b) recognition by all ASEAN member states; (c) agreement to be bound and to abide by the Charter; and (d) ability and willingness to carry out the obligations of membership.

⁵ See for the challenges of Papua New Guinea, as well as Timor Leste, Luke Hunt, 'Papua New Guinea, Timor-Leste Prepare for Strategic Elections' *The Diplomat* (14 November 2016) <<https://thediplomat.com/2016/11/papua-new-guinea-timor-leste-prepare-for-strategic-elections/>> last accessed 12 September 2018.

⁶ ASEAN Chairman Rodrigo Duterte stated at the 30th ASEAN Summit (Manila, Philippines, 29 April 2017) that East Timor's application was still under study; Claire Carter, 'East Timor's Accession to ASEAN' *ASEAN Today* (31 August 2017) <<https://www.aseantoday.com/2017/08/east-timors-accession-to-asean/>> last accessed 11 September 2018.

rights mechanism was in fact already expressed during the 26th ASEAN Ministerial Meeting (Singapore, 23-24 July 1993). As said in Chapter II, Foreign Ministers announced this public engagement after the 1993 Vienna Conference, which appears to be a motivation for the ASEAN Ministers' statement to develop a regional human rights system.

Reaffirming ASEAN's commitment to human rights and the fundamental freedoms that were pronounced in the 1993 Vienna Declaration, the Foreign Ministers agreed that "ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights".⁷ Therefore, they concurred that "ASEAN should also consider the establishment of an appropriate regional mechanism on human rights".⁸ This ambition was amongst others shared in the 1993 ASEAN Inter-Parliamentary Organisation (AIPO) Declaration on Human Rights,⁹ formulated by what is now called the ASEAN Inter-Parliamentary Assembly (AIPA).

The initiatives on human rights brought about both expectations and critique. One of the key challenges that ASEAN faces is the realisation of its full potential to implement human rights aspirations and subsequently comply with and possibly enrich international human rights standards, while still respecting the dynamics of the region.

Whereas the previous chapter focused on each individual ASEAN Member State, this chapter focuses on ASEAN and its history of integration. This will lead to a better understanding of ASEAN's development of its human rights system, as well as its prospects and challenges. ASEAN's history, structure and institutional development as well as its focal points are researched. This shows a gradual process of institutionalisation that has been and still is taking place. During this development and over the years, more areas of cooperation have been included. As mentioned before and further analysed hereinafter, steps have been taken in the area of human rights. This opens up possibilities for ASEAN to further intensify human rights cooperation in the coming years.

⁷ ASEAN Ministers of Foreign Affairs, *Joint Communiqué of the 26th ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993, para. 17, <http://asean.org/?static_post=joint-communicue-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993> last accessed 10 September 2018.

⁸ ASEAN Ministers of Foreign Affairs, *Joint Communiqué of the 26th ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993, para. 18, <http://asean.org/?static_post=joint-communicue-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993> last accessed 10 September 2018.

⁹ ASEAN Inter-parliamentary Organization (AIPO), 14th General Assembly, *Kuala Lumpur Declaration on Human Rights*, (September 1993), available at <http://www.hurights.or.jp/archives/other_documents/section1/2010/03/kuala-lumpur-declaration-onhuman-rights1993.html> last accessed 12 September 2018.

2 REGIONALISM IN ASEAN

2.1 From a loose framework towards an ASEAN Community

The documents that ASEAN has adopted over the years show that while ASEAN was formerly characterised by a loose framework without real legally binding agreements, more areas of cooperation have been implemented and ASEAN institution building has increased over time.

Specifically, while ASEAN was at the outset only based on the concise 1967 Bangkok Declaration, it was complemented by a loose framework of expanding institutions established on *ad hoc* basis over the years in order to respond to the needs of the growing organisation. Numerous ministerial meetings, committees of senior officials and technical working groups were included.¹⁰ Today, ASEAN's organs are the ASEAN Summit, the Committee of Permanent Representatives, the ASEAN Coordinating Council, the three Community Councils, the ASEAN Sectoral Ministerial Bodies, the Secretary-General and the Secretariat, the Committee of Permanent Representatives to ASEAN, the ASEAN National Secretariats, the ASEAN Human Rights Body, and the ASEAN Foundation (Chapter IV ASEAN Charter). Moreover, the organisation has evolved into an ASEAN Community whereby the ASEAN Charter is considered to be the organisation's Constitution.

This section briefly describes how interstate relations were shaped, because this is the framework in which human rights cooperation takes place; this will be analysed in the next chapter.

Established in 1967 with the adoption of the Bangkok Declaration, Indonesia, Malaysia, the Philippines, Singapore and Thailand started their cooperation. The goals of these States were to strengthen and promote meaningful regional cooperation with the aim of contributing to peace, progress and prosperity by means of equality and partnership.¹¹ The Member States considered the promotion of regional peace and stability to be key, while the document only mentioned "respect for justice and the rule of law" and "adherence to the principles of the United Nations Charter" in this regard. It is observed that by giving it a less prominent role, they avoided the perception of ASEAN as a military alliance, which could be considered to be supportive of one of the sides in the Cold War.¹²

¹⁰ Medardo Castillejos Abad Jr, 'The Association of Southeast Asian Nations. Challenges and Responses' in: Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (Institute of Southeast Asian Studies, Singapore 2003), p. 34.

¹¹ ASEAN, *Bangkok Declaration*, Bangkok, 8 August 1967, preamble, <<http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>> last accessed 12 September 2018.

¹² Rodolfo C. Severino, *ASEAN* (Southeast Asia Background Series, Institute of Southeast Asian Studies, Singapore 2008), p. 11. Also in the post-Cold War era ASEAN emphasised that the organisation is not a military alliance or a defence pact; see for instance ASEAN, *Declaration of ASEAN Concord II (Bali Concord II)*, Bali, 7 October 2003, para. 2 on the ASEAN Security Community, <http://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii> last accessed 12 September 2008.

The Member States recognised that they would obtain a stronger position globally if they could cooperate in one organisation. On account of the region's colonial history and past and recent disputes at that time (such as *Konfrontasi*, the territorial dispute over Sabah and the split of Malaysia, Singapore and Brunei Darussalam) and ideological differences, the founding Member States emphasised regional cooperation based on equality, partnership, good understanding, good neighbourliness and meaningful cooperation. The Bangkok Declaration underlined the importance of peace, progress, prosperity, freedom, justice, the rule of law, economic and social stability, stability and security free from external interference¹³ and preservation of the Member States' national identities.¹⁴ These principles furthermore implied a peaceful settlement of disputes and a renunciation of the use of force, which later became explicit elements of the ASEAN Way (discussed hereinafter). While the Declaration is not legally binding, the Declaration gave the *modus operandi* to develop from voluntary and informal arrangements towards more binding and institutionalised agreements.

As ASEAN consisted of newly independent States, the focus lay on building a sense of nationhood.¹⁵ Political cooperation faced difficulties because of the region's history of disputes, political instability and economic poverty.¹⁶ Hence, in the first years after the organisation's establishment political cooperation continued to be minimal until the signing of the 1971 Zone of Peace, Freedom, and Neutrality (ZOPFAN).¹⁷ This document stressed respect for the sovereignty and territorial integrity of all States, absence from the threat or use of force, peaceful settlements of international disputes, equal rights and self-determination and non-interference in the affairs of States. These notions are reiterated in, *inter alia*, the Treaty of Amity and Cooperation in Southeast Asia (TAC), which made the ASEAN treaty based, and the Declaration of ASEAN Concord (both adopted in Denpasar, Bali, 24 February 1976). These documents were the first documents regarding the ambition to formalise the organisation and remain relevant in ASEAN affairs. Specifically, the TAC was described as "the foundational instrument for ASEAN in the ensuing

¹³ This notion was amongst other included because of endeavours of the former colonial powers to regain power in post-colonial times; Rodolfo C. Severino, *ASEAN* (Southeast Asia Background Series, Institute of Southeast Asian Studies, Singapore 2008), p. 13. The principle of non-interference is also applied between the ASEAN Member States at part of the ASEAN Way.

¹⁴ ASEAN, *Bangkok Declaration*, preamble.

¹⁵ Barry Desker, 'Is ASEAN a Community?' [2017] (4) *ASEAN Focus* 4, p. 4.

¹⁶ ASEAN 'Political Achievement' (9 July 2018) <http://asean.org/?static_post=political-achievement> last accessed 13 September 2018. Political aspirations have however always been part of ASEAN, as Ali Alatas (Indonesia's former Foreign Minister) pointed out: "The truth is that politics attended ASEAN at its birth. It was the convergence in political outlook among the five original members, their shared convictions on national priority objectives and on how best to secure these objectives in the evolving strategic environment of East Asia which impelled them to form ASEAN."; *ibid*, para 3.

¹⁷ Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAS Publications, Singapore 2005), p. 15. See for the text ASEAN, *Zone of Peace, Freedom and Neutrality Declaration*, Special ASEAN Foreign Ministers Meeting, Kuala Lumpur, 27 November 1971 <<http://www.icnl.org/research/library/files/Transnational/zone.pdf>> last accessed 13 September 2017.

decades”¹⁸ and lays down legally binding norms for interstate relations.¹⁹ The TAC is accompanied by the Rules of Procedure of the High Council²⁰, which is mandated to “take cognizance of” disputes (see Chapter IV TAC). Based on Articles 15 and 16 TAC the High Council is not a dispute settlement mechanism with binding authority, whereby Article 15 TAC is only applicable if the parties involved in the dispute agree that the procedure of the High Council is to be used.²¹ This corresponds to the position of a number of ASEAN Member States towards arbitration and dispute settlement by the ICJ, as the previous chapter showed.

The Declaration of ASEAN Concord (or Bali Concord I) was innovative because it dealt with political cooperation, whereas this was not explicitly mentioned in the 1967 Bangkok Declaration. In the document, the Member States formulated objectives and principles contributing to political stability. These principles involved strengthening national and ASEAN resilience, establishing a Zone of Peace, Freedom and Neutrality, an intensified cooperation in economic and social development, providing relief (including disaster), cooperation in development programme, peaceful settlement of disputes, promotion of peaceful cooperation. In addition, they adopted a programme of action in the field of political, economic, social, cultural, security cooperation and the expansion of

¹⁸ Barry Desker, ‘Is ASEAN a Community?’ [2017] (4) *ASEAN Focus* 4, p. 4.

¹⁹ ASEAN, *Text of the Treaty of Amity and Cooperation in Southeast Asia and Related Information* (ASEAN Knowledge Kit March 2005, ASEAN, Jakarta 2005), p. 1. Online available at <<http://www.aseansec.org/TAC-KnowledgeKit.pdf>> last accessed 13 September 2018.

²⁰ ASEAN, *Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia*, Hanoi, 23 July 2001, see ASEAN, *Text of the Treaty of Amity and Cooperation in Southeast Asia and Related Information* (ASEAN Knowledge Kit March 2005, ASEAN, Jakarta 2005), p. 22. Online available at <<http://www.aseansec.org/TAC-KnowledgeKit.pdf>> last accessed 13 September 2018.

²¹ Rodolfo Severino observed that the States rather turn to the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS) instead. Mya Than attributed this preference to the unwillingness of the ASEAN States to side with one of their fellow Member States which are in conflict; Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAS Publications, Singapore 2005), p. 18. For example, a territorial dispute between Malaysia and Singapore was adjudicated by the International Court of Justice, see On 2 February 2017 filed an Application to revise this judgment and on 30 June 2017 Malaysia requested for an interpretation of this judgement. These proceedings were closed on 28 May 2018 after Malaysia notified the Court on 28 May 2018 that the Parties came to an agreement; International Court of Justice, Application for revision of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Malaysia v. Singapore), Order, 29 May 2018, General List No. 169 and International Court of Justice, Request for Interpretation of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Malaysia v. Singapore), Order, 29 May 2018, General List No. 170.

organisation's structure.²² The establishment of an ASEAN Secretariat was also agreed upon.²³

Three decades after ASEAN's establishment, the ASEAN Vision 2020²⁴ was adopted in 1997, whereby the 1998 Hanoi Plan of Action (for the years 1999-2004)²⁵ and the 2004 Vientiane Action Programme (VAP, for the years 2004-2010)²⁶ were set up to implement this Vision. Agreement was reached at the height of the Asian financial crisis,²⁷ which struck the region economically, but also affected the region's stability. Davies observed in this respect that it was widely believed that the refusal to comment on the internal affairs of others was a reason for the failure of ASEAN Member States to engage with the causes and consequences of this crisis.²⁸

This ASEAN Vision led to the actual establishment of the ASEAN Community. Important elements of this Vision are peace, justice, the rule of law, national and regional resilience, peaceful settlement of disputes, confidence building, preventive diplomacy, conflict-resolution, sustainable and equitable economic growth, economic integration and mutual assistance, reducing socio-economic inequalities, equality and non-discrimination, reducing poverty, the family as cornerstone of society, empowerment of civil society, special care for vulnerable groups, combating drugs, technological progress, environment and sustainable development, fighting transnational crime, individual welfare and dignity, good of the community, external relations based on equal partnership and mutual respect.

The Hanoi Plan of Action reiterated a number of the principles that were included in the ASEAN Vision 2020. The Hanoi Plan of Action referred, amongst others, to confidence building and to preventive diplomacy based on consensus and at a pace comfortable to all,²⁹ which is typical for ASEAN affairs.

²² ASEAN, *Declaration of ASEAN Concord*, Denpasar, 24 February 1976 <https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976> last accessed 15 September 2018.

²³ ASEAN, *Declaration of ASEAN Concord*, Denpasar, 24 February 1976 <https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976> last accessed 15 September 2018, Section F. Improvement of ASEAN Machinery, Article 1.

²⁴ ASEAN, *ASEAN Vision 2020*, 15 December 1997, <http://asean.org/?static_post=asean-vision-2020> last accessed 15 September 2018.

²⁵ ASEAN, *Hanoi Plan of Action*, Hanoi, 15 December 1998, <https://asean.org/?static_post=hanoi-plan-of-action> last accessed 15 September 2018.

²⁶ ASEAN, *Vientiane Action Programme*, 29 November 2004 <<http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf>> last accessed 15 September 2018.

²⁷ Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 111.

²⁸ Mathew Davies, 'The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration' (2013) 14 *Georgetown Journal of International Affairs* 51, p. 52.

²⁹ Article 8.3 Hanoi Plan of Action.

The 2003 Declaration of ASEAN Concord II (Bali Concord II)³⁰ is key for ASEAN's current structure, as agreement was reached on building an ASEAN Community based on the political-security, the economic and finance, and the socio-cultural community by the year 2020, which was later readjusted to 2015.³¹ These are the three Pillars on which ASEAN is nowadays based. The preamble again stressed "the determination to move forward at a pace that is comfortable to all".³² Agreement was reached that work had to be done concerning the promotion of human rights and the development of the ASEAN Charter in the ASEAN Political Security Community. The intensified level of cooperation thus resulted amongst others in the inclusion of regional human rights cooperation, which is analysed more closely in the next chapter.

The 2004 Vientiane Action Programme,³³ which also reiterated a number of the previous values, provided a roadmap for the three pillars (*i.e.* the political-security, the economic and finance, and the socio-cultural community) for the years 2004-2010.

The adoption of the ASEAN Charter³⁴ marks a significant change in the organisation in terms of institutionalisation and integration, as ASEAN was previously described as an organisation that was essentially a diplomatic community, which linked the foreign ministries of the region, and as a loosely structured organisation.³⁵ One could say that this Charter represents the ambition to change from cooperation to integration. Specifically, the ASEAN Charter is perceived as the document that gives ASEAN legal personality and which makes "legal commitments enforceable by law".³⁶ Indeed, while ASEAN previously exercised restraint in developing formal institutions,³⁷ a legal and institutional

³⁰ ASEAN, *Declaration of ASEAN Concord II (Bali Concord II)*, Bali, 7 October 2003, <https://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii> last accessed 12 September 2018.

³¹ Agreed upon at the Twelfth ASEAN Summit, Cebu, 9-15 January 2007. See amongst others Chairperson's Statement on the 12th ASEAN Summit H.E. the President Gloria Macapagal-Arroyo, 'One Caring and Sharing Community', Cebu, 13 January 2007 <https://asean.org/?static_post=chairperson-s-statement-of-the-12th-asean-summit-he-the-president-gloria-macapagal-arroyo-one-caring-and-sharing-community> last accessed 15 September 2018.

³² Article 8, Section A. ASEAN Security Community Declaration, ASEAN, *Declaration of ASEAN Concord II (Bali Concord II)*, Bali, 7 October 2003, <https://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii> last accessed 12 September 2018.

³³ ASEAN, Vientiane Action Programme, 29 November 2004 <<http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf>> last accessed 15 September 2018.

³⁴ ASEAN, *ASEAN Charter*, 20 November 2007, <http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf> last accessed 15 September 2018.

³⁵ Barry Desker, 'Is ASEAN a Community?' [2017] (4) *ASEAN Focus* 4, p. 5.

³⁶ Ali Alatas, 'The ASEAN Charter: Towards its Ratification and Implementation' in Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 22.

³⁷ Shunmugam Jayakumar described this concern as "organizational minimalism", see David Capie and Paul Evans, 'The ASEAN Way' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 45, quoted in Lee Kim Chew, 'Don't Discard Fundamentals', *Straits Times* (25 July 1998).

framework for ASEAN has been codified that matches the dynamics of the organisation.³⁸ The preamble of the ASEAN Charter hereby reiterated:

Cognisant that mutual respect for independence, sovereignty, equality, territorial integrity and national identity of ASEAN Member Countries has fostered a positive environment for the steady development of an ASEAN Community to meet the challenges in the future.

In addition, it includes “the right of every state to lead its national existence free from external interference, subversion, or coercion and non-interference in the internal affairs of one another”.³⁹ Alongside the codification of these already existing ASEAN norms for interstate relations, the Charter also lays down additional norms, including norms for internal governance. The rule of law, democracy, good governance, human rights and fundamental freedoms, social justice, and international (humanitarian) law, the idea of a people-centred society, the establishment of legal personality, three ASEAN Community Councils, and ASEAN’s motto “One Vision, One Identity, One Community” are also included.

Although consensual decision-making is still the starting point according to Article 20(1) ASEAN Charter, the ASEAN Summit must decide on how a decision is made if no consensual decision could be reached at a lower ASEAN level (Article 20(2) ASEAN Charter). Anwar observed in this regard that these new elements reflect a changing character of the organisation.⁴⁰ Rizal Sukma, however, noted that “it [the Summit] needs consensus in order to depart from consensus. In other words, the decision-making mechanism is still fluid and depends on the circumstances of the day. Thus, it is hardly different from the current practice [*i.e.*, the practice as developed before the ASEAN Charter].”⁴¹

After the Charter, documents were adopted to concretise the ASEAN Community. The Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015) was the guiding document to achieve community status by 2015 and consisted of the ASEAN Political-Security Blueprint,⁴² the ASEAN Economic Community Blueprint⁴³ and the ASEAN Socio-Cultural Community

³⁸ Thi Ha Hoang, ‘Five Decades of ASEAN’s Evolution’ [2017] (5) *ASEAN Focus* 2, p. 3.

³⁹ ASEAN, *Kuala Lumpur Declaration on the Establishment of the ASEAN Charter*, Kuala Lumpur, 22 November 2005 <<http://asean.org/kuala-lumpur-declaration-on-the-establishment-of-the-asean-community/>> last accessed 15 September 2018.

⁴⁰ Dewi Fortuna Anwar, ‘The ASEAN Charter: The Case for Ratification’ in Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ISEAS Publishing, Singapore 2009), p. 32.

⁴¹ Rizal Sukma, ‘The ASEAN Charter: Neither Bold nor Visionary’ in Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ISEAS Publishing, Singapore 2009), p. 53.

⁴² ASEAN, *ASEAN Political-Security Community Blueprint*, Cha-am, 1 March 2009, <<http://asean.org/wp-content/uploads/archive/5187-18.pdf>> last accessed 15 September 2018.

⁴³ This Blueprint was already adopted in 2007, which seems to imply an economic focus of the organisation, or at least a subject on which consensus is easier to reach. See ASEAN, *Declaration on the ASEAN Economic Community Blueprint*, Singapore, 20 November 2007,

Blueprint.⁴⁴ These and the subsequent Blueprints are discussed in more detail later on in relation to their relevance for human rights.

Also relevant was the adoption of the Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III),⁴⁵ which lists a number of areas of cooperation that correspond to the three ASEAN communities. This document includes “the importance of the establishment of a comprehensive partnership between ASEAN and the United Nations”,⁴⁶ as well as reference to fundamental principles of international and the domestic laws of the ASEAN Member States. While ASEAN’s reoccurring values of independence, sovereignty, equality, territorial integrity, non-interference, national identity of all Nations, peaceful settlement of disputes and the renunciation of the treat and use of force are included (Section A, Article 1(a) to (d)), this document also mentions the promotion of peace, “which includes *inter alia*, respect for diversity, promotion of tolerance, and understanding of faiths, religions, and cultures, in accordance with applicable domestic law”.⁴⁷ ASEAN community-building is further developed by the Phnom Penh Agenda for ASEAN Community Building.⁴⁸

While the ASEAN Vision 2020 was adopted to become one ASEAN Community by 2015, ASEAN was indeed formally established as a community when the ASEAN Leaders signed the Kuala Lumpur Declaration on the Establishment of the ASEAN Community during their 27th Summit (Kuala Lumpur, 22 November 2015). This can be considered as a milestone in the integration and evolvement of ASEAN.⁴⁹

In the ASEAN Community Vision 2015,⁵⁰ which charts the path for ASEAN until 2025, more focus seems to lie on regional interests and developing an

<http://asean.org/?static_post=declaration-on-the-asean-economic-community-blueprint> last accessed 15 September 2018. See for the Blueprint itself ASEAN, *ASEAN Economic Community Blueprint*, Singapore, 20 November 2007 <<http://asean.org/wp-content/uploads/archive/5187-10.pdf>> last accessed 15 September 2018.

⁴⁴ ASEAN, *ASEAN Socio-Cultural Community Blueprint*, Cha-am, 1 March 2009, <<http://asean.org/wp-content/uploads/archive/5187-19.pdf>> last accessed 15 September 2018.

⁴⁵ ASEAN, *Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III)*, Bali, 7 November 2011, <<http://www.asean.org/storage/archive/documents/19th%20summit/Bali%20Concord%20III.pdf>> last accessed 15 September 2018.

⁴⁶ ASEAN, *Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III)*, Bali, 7 November 2011, preamble.

⁴⁷ ASEAN, *Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III)*, Bali, 7 November 2011, Section A, Article 1(d).

⁴⁸ ASEAN, *Phnom Penh Agenda for ASEAN Community Building*, Phnom Penh, 3 April 2012, <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2012-Phnom-Penh-Agenda-for-ASEAN-Community-Building.pdf>> last accessed 15 September 2018.

⁴⁹ ASEAN, *Kuala Lumpur Declaration on the Establishment of the ASEAN Community*, Kuala Lumpur, 22 November 2015, <<http://asean.org/kuala-lumpur-declaration-on-the-establishment-of-the-asean-community/>> last accessed 15 September 2018.

⁵⁰ ASEAN, *ASEAN Community Vision*, Kuala Lumpur, 22 November 2015 <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

outward-looking, people-centred organisation. While values linked to the ASEAN Way are still present, the tone of the document seems to have changed.

ASEAN's Pillar Structure was concretised in the Roadmap for an ASEAN Community, whereas Bali Concord III formulates the ambition to have a common platform by 2022.

Even though ASEAN does not have an effective enforcement mechanism, ASEAN formulated the general principle that the organisation shall maintain and establish dispute settlement mechanisms in all of ASEAN's cooperation (Article 22(2) ASEAN Charter). This led to the adoption of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (the DSM Protocol),⁵¹ although it has not entered into force, because it needs to be ratified by all ten ASEAN Member States. After full ratification, this Protocol will be applicable in the event that the Treaty of Amity and Cooperation (according to Article 24(2) ASEAN Charter applied to disputes "which do not concern the interpretation or application of any ASEAN instrument") and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Vientiane Protocol on economic disputes) do not apply. If this Protocol is ratified, the instrument will be applied to disputes on all other ASEAN instruments, including the ASEAN Charter and a possible future ASEAN Convention on Human Rights.

Based on the above, it can be determined that ASEAN's communities, at least on paper, have developed further. One should, however, bear in mind that there is poor cross sectoral interaction and a lack of a 'whole ASEAN' approach.⁵² According to Barry Desker, cross-sectoral coordination is still maturing as the focus of ASEAN policymakers is currently on their own sectors. He pinpointed poor funding of the ASEAN Secretariat and its ineffectiveness in playing a bridging role as one of the problems.⁵³

While these key documents paint the picture of ASEAN's integration, Hoang Thi Ha captured the process of ASEAN as followed:

Although ASEAN is traditionally known for its preference for informal arrangements, the organisation has become more rules-based and institutionalised over the years. This is a natural and gradual evolution in response to integration and community building needs, and a result of growing levels of comfort, trust and political maturity among ASEAN member countries. [...] From a minimal structure centred around the annual meetings of ASEAN foreign ministers in its early years, ASEAN now encompasses hundreds of sectoral and coordination mechanisms across various political security and socioeconomic areas. ASEAN has also become more rules-based with the number of ASEAN legal instruments, both in force and waiting for entry into force, increasing from 32 by 1990 to 179 in 2017.⁵⁴

⁵¹ ASEAN, *Protocol to the ASEAN Charter on Dispute Settlement Mechanisms*, Hanoi, 8 April 2010, <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2010-Protocol-to-the-ASEAN-Charter-on-Dispute-Settlement-Mechanisms.pdf>> last accessed 15 September 2018.

⁵² Barry Desker, 'Is ASEAN a Community?' [2017] (4) *ASEAN Focus* 4, p. 5.

⁵³ Barry Desker, 'Is ASEAN a Community?' [2017] (4) *ASEAN Focus* 4, p. 5.

⁵⁴ Thi Ha Hoang, 'Five Decades of ASEAN's Evolution' [2017] (5) *ASEAN Focus* 2, p. 3.

While this author observed that ASEAN became more rules-based over the years, it is questionable whether the ASEAN Charter actually made a significant change to the organisation. The ASEAN Way is maintained in terms of the level of informality. The enforcement of compliance, including a form of sanction, is still lacking. This is problematic; while the ASEAN Charter formally endorses various (new) principles, the problem of implementation and compliance remains.

The Charter does not, for example, provide for the possibility to suspend or expel a Member State in case of non-compliance. Article 5(3) ASEAN Charter, which states that “in case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20”, does not seem to make any difference. Article 20(4) ASEAN Charter generally asserts that “in case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision”. The ASEAN Summit still has to reach a decision based on consultation and consensus unless it is unable to reach a consensual agreement. In the latter case, the Summit can decide on its decision-making process. Given the necessity of consultation and consensus, consensual decision-making is necessary for asserting how it should make a decision that is not based on consensus.

The current Charter does not necessarily dictate ASEAN’s future practice, as the Charter is not considered to be static, but as a document that can advance together with the organisation itself.⁵⁵ Article 48 of the Charter provides for the possibility to amend the Charter. In addition, Article 50 of Charter stipulates that the Charter can be reviewed after five years after the document came into force or when the ASEAN Summit decides so. Tan Sri Ahmad Fuzi bin Abdul Razak, pointed out in this respect that “[t]he so-called “lowest common denominator” can be gradually upgraded over the years as ASEAN matures”.⁵⁶

Concrete steps have to be taken for a successful implementation and further development of the Charter. Institutionally, the ASEAN Charter needs, for example, more detailed provisions on the ASEAN Community Councils and the AIHCR. Further progress should also be made in the field of people participation. While ASEAN wants to present itself as a people-oriented organisation, the Charter does not specify public participation. The way in which ASEAN evolves, which is still very much State centric, remains a challenge.

⁵⁵ Tommy Koh, Rosario G. Manolo and Walter Woon, ‘Preface’ in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. xxi.

⁵⁶ Tan Sri Ahmad Fuzi bin Abdul Razak, ‘Facing Unfair Criticisms’ in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 25. Aung Bwa, former member of the ASEAN High Level Task Force on the ASEAN Charter, reflected: “We [Myanmar] felt that the ASEAN Charter must be one that every member states must be comfortable with, encompassing a sense of belonging and partnership, future-oriented, forward-looking, and bold but not over-ambitious”; Aung Bwa, ‘The Jewel in my Crown’ in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 28.

2.2 ASEAN's challenges to regional cooperation

The organisation has grown over time, and currently comprises ten Southeast Asian States, incorporating various areas of cooperation and receiving international recognition. The Member States cooperate in numerous areas, which are categorised in the three Communities. The previous section showed that the ASEAN Charter serves as a momentum for further cooperation and integration in different areas, including human rights as part of ASEAN's ambition of becoming a people-oriented organisation (Article 1(13) ASEAN Charter, further discussed in the next chapter).

While a deeper level of integration was sought with the adoption of the ASEAN Charter and the development of the three ASEAN Communities, challenges remain in the areas of political solidarity, implementing agreements and cooperating at a more intensified level, amongst others in the field of human rights.⁵⁷ The following observations clarify the challenges that ASEAN faces.

Rodolfo Severino made the critical observation that ASEAN's institutions and processes have their weaknesses in terms of economic integration, although one could place his observation in a broader perspective because it seems a general characteristic of the organisation. Specifically, this former ASEAN Secretary-General argued that it is difficult to make progress on initiatives and to ensure that its Member States comply with their obligations. According to Severino, a possible explanation is that Member States give prevalence to their respective national and political interests over the regional interests.⁵⁸

Furthermore, some ASEAN commentators have doubted whether ASEAN could become a regional community as is proposed in the various documents. According to Sukma, the ASEAN Charter should develop an ASEAN community, which caters for a common regional identity. This ASEAN community should have the following three characteristics: (i) a people-centred orientation in ASEAN processes, (ii) the reconciliation of differences by formulating common norms and values, and (iii) compliance to ASEAN's documents.⁵⁹ Sukma correctly observed that the ASEAN Charter is not adequately approaching these three aims.⁶⁰ For instance, the ASEAN Charter underscores the importance of a people-oriented approach (Article 1(13) ASEAN Charter). Yet, the extent and the way in which people, within and outside civil society organisations, can be involved is limited

⁵⁷ Rodolfo C. Severino, *ASEAN* (Southeast Asia Background Series, Institute of Southeast Asian Studies, Singapore 2008), p. 74.

⁵⁸ Rodolfo C. Severino, *ASEAN* (Southeast Asia Background Series, Institute of Southeast Asian Studies, Singapore 2008), p. 58.

⁵⁹ Rizal Sukma, 'The ASEAN Charter: Neither Bold nor Visionary' in Pavin Chachavalpongpon (ed.), *The Road to Ratification and Implementation of the ASEAN Charter* (ISEAS Publishing, Singapore 2009), p. 45.

⁶⁰ Rizal Sukma, 'The ASEAN Charter: Neither Bold nor Visionary' in Pavin Chachavalpongpon (ed.), *The Road to Ratification and Implementation of the ASEAN Charter* (ISEAS Publishing, Singapore 2009), pp. 46-47.

(see Annex 2 to the ASEAN Charter regarding the entities which are associated to ASEAN).

In addition, economic, political, social and cultural differences and national interests make it a challenge to find common ground in norms and values. The diverging political regimes, for example, pose a challenge to finding a shared political attitude. Democracy is amongst others a difficult common topic, although it is included in the ASEAN Charter. Muntarbhorn observed in this respect:

Some of the countries [are], as we know, non-democratic in real terms. But officially and formally, who is going to deny...? So officially and formally, they will all agree with democracy as a principle. And then, you know, they have all their own lapses in terms of interpretation.⁶¹

Also difficult is the topic of human rights and fundamental freedoms and the establishment of an appropriate human rights mechanism (included in the preamble and Articles 1(7), 2(i) and 14 of the ASEAN Charter), which is analysed in more detail in the next chapter. Sukma rightly referred to the extensive debate on the AICHR and the Myanmar issue.⁶² The different attitudes on human rights and democracy were furthermore exemplified by the Myanmar military junta and their lack of respect for these values during the crackdown in 2007, and the minimum response of the other ASEAN Member States. The current Rohingya crisis in Myanmar and the lack of a response from ASEAN and its individual Member States is also illustrative.

Given the existing diversity, Anak Aging Banyu Perwita opted for the promotion of Indonesia's national motto, *bhinneka tunggal ika*; a principle that means 'unity in diversity'. This principle is in fact included in Article 2(2)(l) ASEAN Charter, which mentions "respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity". Former ASEAN Secretary-General Le Luong Minh also referred to this principle. He stressed that the diversity in terms of culture, religion, history and political systems has created the strength for ASEAN. ASEAN turned this diversity into an advantage in its process of community-building and integration, he added.⁶³

Although diversity has been proffered by former ASEAN Secretary-General Le Luong Minh as one of the reasons for ASEAN's success, other commentators have opted to refer to universal values. It was, for instance, argued that regional identity

⁶¹ Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

⁶² Rizal Sukma, 'The ASEAN Charter: Neither Bold nor Visionary' in Pavin Chachavalapongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ISEAS Publishing, Singapore 2009), pp. 48-49.

⁶³ —, "'Unity in diversity' creates ASEAN identity", *Vietnam Plus* (Jakarta, 29 December 2015), <<http://en.vietnamplus.vn/unity-in-diversity-creates-asean-identity/86879.vnp>> last accessed 15 September 2018.

is more feasible when it is built upon recognised universal values, which include human rights, mutual prosperity and freedom from oppression”.⁶⁴ When looking at the documents discussed in the previous section, it appears that ASEAN is trying to combine its diversity with international law and universal values.

ASEAN also faces challenges with respect to the ability and willingness to implement and ensure compliance of its rules and procedures. It was argued that “a well-delineated and endowed institutional framework with authoritative procedures is not in harmony with the Asean spirit”.⁶⁵ The Eminent Persons Group on the ASEAN Charter (EPG) observed that “ASEAN’s problem is not one of lack of vision, ideas, and action plans. The real problem is one of ensuring compliance and effective implementation of decisions”.⁶⁶ Therefore, the EPG formulated in its report a number of recommendations, such as the establishment of a dispute settlement mechanism in all fields of cooperation, which should include compliance monitoring and advisory, consultation and enforcement mechanisms. A special role was given to the ASEAN Secretariat and the Secretary-General, as they should monitor compliance with ASEAN agreements and actions plans and report to the ASEAN Council and Community Councils respectively. Within ASEAN’s current structure, the Secretary-General facilitates and monitors compliance with ASEAN agreements and decisions, on which he reports annually to the ASEAN Summit. The Secretary-General can also play a role in ASEAN’s dispute settlement mechanism (chapter VIII ASEAN Charter). The Secretary-General and the Secretariat are independent in the sense that Member States are not allowed “to seek to influence them in the discharge of their responsibilities” (Article 11(9) ASEAN Charter).

The EPG also added that the organisation should also have powers to take measures to redress serious breaches of ASEAN’s objectives, major principles and commitments to important agreements. Non-compliance with decisions following from the dispute settlement could, according to the EPG, lead to suspension of rights and privileges of membership.⁶⁷

Against the backdrop of the recommendations of the EPG, the Charter is inadequate with regard to compliance mechanisms. The following articles deal with compliance, albeit in general terms. Article 5 on rights and obligations stipulates in Section 3: “In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20.” This article deals with consultation and consensus. Decision-making is based on consensus unless no consensus can be reached. In that case, the Summit will decide upon the way in which a decision is

⁶⁴ Rizal Sukma quoting Pavin Chachavalpongpon; Rizal Sukma, ‘The ASEAN Charter: Neither Bold nor Visionary’ in Pavin Chachavalpongpon (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ISEAS Publishing, Singapore 2009), p. 49. See also Pavin Chachavalpongpon, ‘In Search of an Asean Identity’, *The Nation* (Bangkok, 4 May 2006).

⁶⁵ Muthiah Alagappa, ‘Institutional Framework. Recommendations for Change’ in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 22.

⁶⁶ ASEAN, *Report of the Eminent Persons Group on the ASEAN Charter*, December 2006, p. 4.

⁶⁷ ASEAN, *Report of the Eminent Persons Group on the ASEAN Charter*, December 2006, p. 4.

made. Article 20(4) lays down the following: “In the case of a serious breach of the Charter or noncompliance, the matter shall be referred to the ASEAN Summit for decision.” Finally, Article 27 on compliance, reads as follows:

1. The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit.
2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.

This led to the adoption of the Instrument of Incorporation of the Rules for Reference of Unresolved Disputes to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms⁶⁸ and the Rules for Reference of Non-Compliance to the ASEAN Summit⁶⁹ as alternatives to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms; the latter Protocol has not entered into force as not all ASEAN Member States have ratified it. The challenges that ASEAN faces while broadening and deepening cooperation are connected to and influenced by what is called the ASEAN Way. Therefore, this ASEAN Way is analysed in more detail in the next Section.

3 THE ASEAN WAY

The ASEAN Way or ASEAN’s code of conduct has been present in ASEAN since the organisation’s establishment and continues to influence ASEAN affairs to date. As seen in the previous section, while the TAC lays down the norms for interstate relations in a treaty, these notions or code of conduct have been addressed in various key ASEAN documents throughout the years. Accordingly, as this style of diplomacy naturally also influences the possibilities for regional human rights protection and promotion, it is important to analyse this ASEAN approach. In an attempt to comprehend the ASEAN Way, together with the implications for regional cooperation in the field of human rights, the ASEAN Way is described. The principles of non-interference and consensus are hereby addressed in more detail.

This section aims to capture the essence of the ASEAN Way, whereby the following must be borne in mind:

⁶⁸ ASEAN, *Instrument of Incorporation of the Rules for Reference of Unresolved Disputes to the ASEAN Summit to the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms*, Hanoi, 27 October 2010, < <http://agreement.asean.org/media/download/20160316010617.pdf>> last accessed 15 September 2018.

⁶⁹ ASEAN, *Rules for Reference of Non-Compliance to the ASEAN Summit*, <<http://www.asean.org/storage/images/archive/documents/ANNEX%206%20Rules%20for%20Reference%20of%20Non-Compliance%20to%20the%20ASEAN%20Summit.pdf>> last accessed 15 September 2018.

The “ASEAN Way” has inherited a mythical component, it is everything about ASEAN and nothing in particular; a reference point for an intangible character, nuance, style, norm and regional law and regime all encompassed in one; a concept as pervasive and slippery as the “Asian Values” debate. Naturally, there are many definitions as there are perceptions of the aims underlying ASEAN modes of cooperation. But according to political leaders who speak its merits, it has worked.”⁷⁰

The characteristics of ASEAN diplomacy appear to be present in the ASEAN region before the organisation’s establishment. Capie and Evans refer in this respect to Estrella D. Solidum’s observation on the Association of Southeast Asia, which existed from July 1961 until August 1967. This Association stressed that “Asian solutions that contain Asian values” must be applied when resolving problems, which meant according to Solidum amongst others the use of “very low-key diplomacy [which] avoids fanfare before an agreement is reached” and “invisible ground rules”.⁷¹

At the start of ASEAN, the perception was that a certain, non-binding form of conflict management was necessary between the then five Member States. A low level of cooperation was desired, because otherwise the bilateral and regional stability or national interests could be jeopardised.⁷² In this respect, Pushpa Thambipillai provided a plausible explanation for the origins of the ASEAN Way when she clarified that the geopolitics in the 1960s required a gradual evolvement of regional institutions and identity. To maintain stability, any kind of imposition of this process was inconceivable. Instead, a modus to converge common interests whereby differences were not openly emphasised was imperative. This form of decision-making and the principle of non-interference became crucial for ASEAN, whereby it has been observed that this ASEAN Way “stands for flexibility, pragmatism, consensus building and gradualism”.⁷³

Other authors have provided various descriptions. For instance, the ASEAN Way is summarised by Ali Alatas as a form of cooperation which has been “loose and informal, relying on political persuasion rather than legal enforcement and basing itself on *musyawarah* (consultation) and *mufakat* (consensus)”,⁷⁴ discussed

⁷⁰ Pushpa Thambipillai, 'Challenges to the ASEAN Way: Musyawarah and non-interference' (2000) 18 *Kajian Malaysia* 157, p. 159.

⁷¹ David Capie and Paul Evans, 'The ASEAN Way' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 10. Reference is made to Estrella D. Solidum, 'The Role of Certain Sectors in Shaping and Articulating the ASEAN Way' in R.P. Anand and Purificacion V. Quisumbing (eds), *ASEAN Identity, Development and Culture* (University of the Philippines Law Center and East-West Center Culture Learning Institute, Quezon City and Honolulu 1981).

⁷² Pushpa Thambipillai, 'Challenges to the ASEAN Way: Musyawarah and non-interference' (2000) 18 *Kajian Malaysia* 157, p. 158.

⁷³ Kao Kim Houn, 'A Personal Reflection' in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 156.

⁷⁴ Keynote address at the Expert Roundtable Discussion on the Road to Ratification and Implementation of the ASEAN Charter (Jakarta, 17 July 2008), see Ali Alatas, 'The ASEAN Charter: Towards its Ratification and Implementation' in Pavin Chachavalpongpun (ed), *The Road to*

in more detail hereinafter. This former Indonesian Minister added furthermore that “this way of functioning has *not* resulted in ASEAN being ineffective”,⁷⁵ as he explained that peace and stability is maintained, which provide a stable climate favourable to economic cooperation and integration.⁷⁶ In other words, the ASEAN Way is a form of diplomacy, which was initially based on informal structures in which inclusive dialogue is key and in which its Member States make non-binding agreements based on consultation and consensus.

Armitav Acharya observed in this regard that ASEAN’s approach is “better described as one of conflict avoidance than conflict resolution”.⁷⁷ He also referred to it as an “approach [which] involves a high degree of discreteness, informality, pragmatism, expediency, consensus-building, and non-confrontational bargaining styles”, contrary to what can be expected from the expanding references to the international human rights standards, their process, regulation and coordination”.⁷⁸ The building of trust is also an important factor in ASEAN relations. This can best be achieved by personal contact between ASEAN leaders and rather without agenda’s or interpreters. This practice has been described in the ASEAN region as *empat mata* (meaning four eyes, or face-to-face individual contact).⁷⁹ The key elements of ‘process’ and ‘inclusiveness’ imply amongst others the notion of patience. Capie and Evans referred in this regard to Mahathir Mohamad’s observation that a dialogue process begins with “the tedious process of getting to know each other”⁸⁰ and observations like “the process is as important as any eventual agreement”.⁸¹ Mya Than summarised the ASEAN Way as a *modus operandi*, which:

Ratification and Implementation of the ASEAN Charter (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 16.

⁷⁵ Ali Alatas, ‘The ASEAN Charter: Towards its Ratification and Implementation’ in Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 16.

⁷⁶ Ali Alatas, ‘The ASEAN Charter: Towards its Ratification and Implementation’ in Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009) p. 16.

⁷⁷ Amitav Acharya, ‘Ideas, Identity and Institution Building: From the ASEAN Way to the Asia-Pacific Way?’ (1997) 10 *Pacific Review* 319, p. 335.

⁷⁸ Amitav Acharya, ‘Ideas, Identity and Institution Building: From the ASEAN Way to the Asia-Pacific Way?’ (1997) 10 *Pacific Review* 319, quoted in Howard Loewen, ‘Democracy and Human Rights in the European-Asian Dialogue: A Clash of Cooperation Cultures?’ (GIGA Working Paper 92, 2008). See also Theodor Rathgeber, ‘Human Rights and the Institutionalisation of ASEAN: An Ambiguous Relationship’ (2104) 33 (3) *Journal of Current Southeast Asian Affairs* 131, p. 160.

⁷⁹ David Capie and Paul Evans, ‘The ASEAN Way’ in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 46, referring to Michael Antolik, *ASEAN and Diplomacy of Accommodation* (East Gate Books, New York 1990), p. 90.

⁸⁰ David Capie and Paul Evans, ‘The ASEAN Way’ in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 46.

⁸¹ David Capie and Paul Evans, ‘The ASEAN Way’ in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 46.

places a premium on informal approaches and on personal relationships between political and governmental elites. It assumes that relations between members should not be held hostage to the inability to resolve bilateral disputes, whether territorial or otherwise, for indeed the disputes may be complex and not easy to resolve. Rather, problems which cannot be resolved should be put aside until such time, which may be many years, that they become more amenable to resolution because of changed circumstances. The maintenance and development of good cooperative relations in other areas are seen as too important to be held up by a few intractable problems.⁸²

The ASEAN Way is also described as an approach “to reach a consensus among member countries, arriving at an agreement at the lowest common denominator”.⁸³ Indeed, the evolvement of ASEAN and its topics of cooperation are based upon the lowest common denominator, or what Capie and Evans addressed as a “level of comfort” whereby the pace is not “too fast for those who want to go slow and not too slow for those who want to go fast”.⁸⁴

The key instruments in ASEAN’s integration as discussed in Subsection 2.1 of this chapter demonstrate a number of reoccurring objectives and values mirroring the ASEAN Way. As can be deduced from these documents, the ASEAN Way revolves around equal partnership, good understanding, good neighbourliness, mutual trust, confidence building and mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of each Member State, the right of every State to lead its national existence free from external interference, subversion or coercion, self-determination and non-interference in the internal affairs of one another, preventive diplomacy, peaceful settlement of differences and disputes, renunciation of the threat or use of force, and effective cooperation based on dialogue, consultation and consensus.

Moreover, the documents analysed show a preference for declarations instead of treaties. Acharya’s observation on the first Asian-African Conference (Bandung, 18-24 April 1955)⁸⁵ is also applicable to ASEAN. More specifically, a discussion of the instruments illustrates that the ASEAN Member States show a long-standing inclination towards a non-legalistic approach, which can be summarised as non-intrusive and informal, and that consensus-based diplomacy is preferred over a legalistic and formal one. The practice of setting a flexible agenda, omitting controversial issues and making decisions by consensus indeed became typical for ASEAN. These factors bring about that ASEAN’s progress and the development of

⁸² Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAS Publications, Singapore 2005), p. 18.

⁸³ Sree Kumar, 'Introduction' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (Institute of Southeast Asian Studies, Singapore 2003), p. 3.

⁸⁴ David Capie and Paul Evans, 'The ASEAN Way' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 47. This was uttered with respect to the ASEAN Regional Forum in 1995, but applies to ASEAN in general.

⁸⁵ Amitav Acharya, 'Bandung's 1955 Asia-Africa Conference and Indonesia', *The Jakarta Post* (Jakarta, 18 April 2005), reprinted in Amitav Acharya, *Asia Rising, Who is Leading?* (World Scientific Publishing Company, Singapore 2008), pp. 51-54.

areas of cooperation is mainly determined by the lowest common denominator, both regarding the area of cooperation as well as in the pace in which ASEAN evolves.

The fact that the ASEAN Way has remained relevant over the years is *inter alia* noticeable in the drafting process of the ASEAN Charter. Termsak Chalermpananupap commented in this respect the following:

The ASEAN Charter is certainly imperfect. None of the drafters is completely satisfied with the outcome. Anything done by consensus would certainly not be the most desirable. But this is how ASEAN keeps every member state on board, moving together at a pace comfortable to all. No one is left behind unhappy.⁸⁶

Moreover, Dian Triansyah Djani observed in this respect:

Early on, there were many quarters [...] that were yet to be convinced of the need for a Charter. The argument was always that for 40 years of its existence, ASEAN has always been able to grow and become a safe region free from the threat of outright war, due to its flexibility as an association and due to the “ASEAN Way” of doing things. The fear of losing an inch of sovereignty and the suspicious of one’s neighbour still linger on. Questions of interference and problems arising from border disputes remained unresolved and were swept under the carpet.⁸⁷

Regarding this attitude, Zakaria Haji Ahmad argued “Perhaps, indeed, there is a notion that certain problems are best swept under the carpet, a style which might conceivably be regarded as non-Western or even indigenously Southeast Asian”.⁸⁸

Furthermore, Tan Sri Ahmad Fuzi bin Abdul Razak, Malaysia’s HLTF-member, commented on the negotiations on the ASEAN Charter:

No undue pressure of one or more states by other member states was tolerated. Persuasion and the power of arguments were recognised as the basis for compromise and final agreement. No single member state could claim to play the dominant role or that the Charter was based on its original draft. It was entirely a collective effort from the beginning to the end. The process itself reflected a clear example of a politically negotiated but legally binding ASEAN document par excellence.⁸⁹

When analysing the ASEAN Way, the following observations can be made. While informality and inclusion have characterised the drafting process of the

⁸⁶ Termsak Chalermpananupap, 'In Defence of the ASEAN Charter' in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 128.

⁸⁷ Dian Triansyah Djani, 'A Long Journey' in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 140.

⁸⁸ Zakaria Haji Ahmad, 'The Structure of Decision-Making' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (2nd edn, Institute of Southeast Asian Studies, Singapore 2003), pp. 28-32.

⁸⁹ Tan Sri Ahmad Fuzi bin Abdul Razak, 'Facing Unfair Criticisms' in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 20.

ASEAN Charter, it is this document together with the continuous expansion and deepening of cooperation among the ASEAN Member States that necessitate an adaption of the ASEAN Way. If not, ASEAN cannot maintain a meaningful role in Southeast Asian affairs and maintain and broaden its external relations. Alatas seems to share the same line of thinking, as he already noted in 2009 that the ASEAN Way has managed to maintain peace and stability thus far, but that current and future challenges call for changes in the informal ASEAN Way.⁹⁰ Indeed, while the ASEAN Way implied what Shunmugam Jayakumar described as “organizational minimalism”⁹¹ and a preference for informality, ASEAN’s increased level of integration affects the relevance of the notions.

The ASEAN Charter in fact shows a changing attitude, at least on paper. While Yuen Foong Khong commented at the end of the millennium that “ASEAN officials have contrasted their approach to [those] that emphasize legal contracts, formal declarations, majoritarian rules, and confrontational negotiation tactics”,⁹² the ASEAN Charter deals for instance with the settlement of disputes (Chapter VIII of the ASEAN Charter). Article 22(2) ASEAN Charter states that “ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation”. In addition, new topics have been included. A vivid example, and subject of this research, is the inclusion of human rights and other related principles, which also led to the ASEAN Human Rights Declaration, human rights documents that specifically focus on vulnerable groups, and human rights organs.

The ASEAN Charter, which codified “all ASEAN norms, rules and values” and reaffirmed “principles, goals and ideals contained in ASEAN’s milestone agreements”,⁹³ is indeed an important document for nuancing ASEAN’s values and principles. The ASEAN Charter reiterates not only principles governing interstate behaviour such as the non-use of force or threat of force, peaceful settlement of disputes and non-interference in internal affairs, but also mentions norms dealing with the relationship between the Member State and its citizens. Domestic affairs according to the Charter should be in conformity with good governance,

⁹⁰ This observation was made in the keynote address of Ali Alatas during the Expert Roundtable Discussion on The Road to Ratification and Implementation of the ASEAN Charter, to which is referred by Pavin Chachavalpongpon, 'Introduction' in Pavin Chachavalpongpon (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 4.

⁹¹ See David Capie and Paul Evans, ‘The ASEAN Way’ in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 45, quoted in Lee Kim Chew, ‘Don’t Discard Fundamentals’, *Straits Times* (25 July 1998).

⁹² Yen Foong Khong, quoted in David Capie and Paul Evans, *The Asia-Pacific Security Lexicon* (updated 2nd edn, ISEAS Publishing, Singapore 2007), p. 11.

⁹³ ASEAN, *Kuala Lumpur Declaration on the Establishment of the ASEAN Charter*, Kuala Lumpur, 12 December 2015, paras. 3 and 4, <<https://asean.org/asean/asean-charter/kuala-lumpur-declaration/>> last accessed 15 September 2018.

democracy, social justice and equitable access to opportunities.⁹⁴ The principles enshrined in Article 2(g) to 2(j) of the Charter are new:

- (g) Enhanced consultations on matters seriously affecting the common interest of ASEAN;
- (h) Adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- (i) Respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- (j) Upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

As these principles affect the ideas on the State sovereignty, the ASEAN Way is in need of reinterpretation. In addition, these principles should enhance the accountability of the organisation, of which their importance was especially stressed by Indonesia.⁹⁵ The circumstance that Member States were still wary of intrusion in their domestic affairs at the time of the adoption of the ASEAN Charter, can also be deduced from the following ASEAN principles as enshrined in Article 2 of the Charter:

- (e) Non-interference in the internal affairs of ASEAN member states;
- (f) Respect for the rights of every member state to lead its national existence free for external influence, subversion and coercion;
- [...]
- (k) Abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

Furthermore, from the ASEAN Way follows a State-centric approach while ASEAN strives to become more people-oriented. One can see that these newly included principles are restricted by the old conservative values that have been present since ASEAN's establishment. Dewi Fortuna Anwar observed in this respect that some critics on the ASEAN Charter fear that it may become more difficult to address human rights violations in the Member States now that the old principles are included in the ASEAN Charter. In particular, addressing one's human rights violations could be considered as breaching another codified ASEAN

⁹⁴ Pavin Chachavalpongpon, 'Introduction' in Pavin Chachavalpongpon (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 6.

⁹⁵ Dewi Fortuna Anwar, 'The ASEAN Charter: The Case for Ratification' in Pavin Chachavalpongpon (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 36.

principle, namely the principle of non-interference.⁹⁶ While this observation is correct, the principles that ASEAN included in the Charter are equally important, which could nuance Anwar's observation.

From the analysis of ASEAN key instruments follows that the principles of non-interference and consensus are important principles to ASEAN. Therefore, these principles are analysed more closely.

The principle of non-interference

Severino rightly stressed that the principle of non-interference is not invented by ASEAN, as the principle evolved from the time of the Peace of Westphalia (1648).⁹⁷ Muntarbhorn aptly highlighted Severino's observation:

The frequent implication is that of the "doctrine", policy or practice peculiar to ASEAN, as if the Association had invented it. Sometimes the criticism amounts to hackling or jeering. The public complaints have arisen in recent years, most of them in commentaries about certain events or situations in Southeast Asia. The leading issues have been East Timor, the haze arising from land and forest fires in Indonesia, the financial crisis of 1997-8, and above all, Myanmar and the question of human rights in general. Most of the commentaries do not specify what precisely ASEAN as an association or its member-States should have done about these situations; they have generally been appeals to simply "do something" about the problem, blaming ASEAN's failure to act on the member states' rigid adherence to the principle of non-interference. There seems to be an element of frustration in this, in the face of the international community's apparent helplessness or the region's inaction.⁹⁸

Yet, a strong emphasis on the principle of non-interference throughout the years is a distinctive feature of ASEAN, as is visible in the analysis of ASEAN's key documents. According to Theodor Rathgeber, this principle remains prevalent:

Despite the formal acknowledgement of the international involvement, member states of ASEAN continue to define the state's interest in the human rights context predominantly in terms of public order, political stability, economic welfare and further instruments to maintain the state's sovereignty against "international intervention" on human rights.⁹⁹

⁹⁶ Dewi Fortuna Anwar, 'The ASEAN Charter: The Case for Ratification' in Pavin Chachavalpongpun (ed), *The Road to Ratification and Implementation of the ASEAN Charter* (ASEAN Studies Centre Report No 3, ISEAS Publishing, Singapore 2009), p. 33.

⁹⁷ Rodolfo C. Severino, *ASEAN* (Southeast Asia Background Series, Institute of Southeast Asian Studies, Singapore 2008), p. 22.

⁹⁸ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 183 and Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community. Insights from the former Secretary-General* (ISEAS Publishing, Singapore 2006), p. 85.

⁹⁹ Theodor Rathgeber, 'Human Rights and the Institutionalisation of ASEAN: An Ambiguous Relationship' (2104) 33 (3) *Journal of Current Southeast Asian Affairs* 131, p. 160, hereby referring to Seth R. Harris, 'Asian Human Rights: Forming a Regional Covenant' (2000) 1 (17) *Asian-Pacific Law & Policy Journal* 1, Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human*

Possible explanations for including the principle of non-interference in ASEAN's affairs from the organisation's commencement could be the colonial experiences of almost all Member States and the attempts of former colonisers to regain power in early post-colonial times, the threat of communist China during the country's Great Proletarian Cultural Revolution and the existing political, economic, cultural and historical diversity among the Member States.¹⁰⁰ The strict adherence might also be explained by the diversity that exists among the Member States. Noel L. Morada's observation is in this regard relevant, who stated that "[t]he pluralist nature of ASEAN essentially limits the capacity of the organization to respond effectively to crisis situations within member states that stem from political or identity-based conflicts".¹⁰¹

The principle of non-interference is, however, not static. It is observed that the principle is not as strong as at the start of ASEAN and continues to be tested and evolve.¹⁰² In addition, the closed-door meetings affect the transparency of the organisation:

[I]t is in these closed-door meetings that ASEAN, in a sense, interfere[s] in the internal situations, that, this is where they really discuss things openly. And, outside the glare of media [they] are able to come to compromised solutions. So, they find this very useful. They do it all the time (...) Play golf, for example. It's a standard informal meeting of ASEAN Officials. There is always a session to play golf as well, they discuss many things. And it is in these meetings they are able to discuss very contentious issues, which are... can be viewed as interference. So in a way, they have been interfering in the internal affairs of one another, but I guess it is really through

Rights Quarterly 281 and Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003). Davies considers these kinds of observations within realist scholarship, which "suggests the Declaration reveals both the disinterest of member states in human rights concerns and the primacy of traditional state-security concerns"; Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 108. Setting this aside, together with constructivism and what he describes as acculturalist approach, he argues that "the Declaration reveals that human rights norms are clearly important to ASEAN members, but this importance has taken very different forms in each state, resulting in member states' diverging motives in approaching the subject"; Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, pp. 108-109.

¹⁰⁰ Rodolfo C. Severino, *ASEAN* (Southeast Asia Background Series, Institute of Southeast Asian Studies, Singapore 2008), p. 23. While it seems that mainly the colonial and post-colonial period influenced the importance of the principle of non-interference, the region was in the pre-colonial period also subject to foreign influence or occupation. Mainly Indian and Chinese influence occurred in terms of religion, trade, culture and politics. See for a short overview of the region's history Peter Church (ed), *A Short History of South-East Asia* (John Wiley & Sons, Singapore 2009).

¹⁰¹ Noel L. Morada, 'Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview' (2016) 8 *Global Responsibility to Protect* 111, p. 112.

¹⁰² According to one of the respondents during the fieldwork conducted in the period from September 2009 until February 2010. Interview on file with the author.

the closed sessions. If you make that very transparent, then they are not prepared at this point. They are not... It's not easy to discuss in public. So it is like a deliberation of the Cabinet of Ministers among themselves, which are privileged.¹⁰³

The fluidity of the principle of non-interference was also visible in the attitudes of Indonesian politician Yusuf Wanandi, Malaysia's former Deputy Prime Minister Anwar Ibrahim, and former ASEAN Secretary-General Surin Pitsuwan, then in his capacity as Thai Foreign Minister. Already in 1997, Wanandi pleaded for a reinterpretation of the idea of non-interference given the Myanmar issue.¹⁰⁴ In the same year, Anwar focussed on what he called "constructive intervention" or "constructive involvement" in order to prevent that regional problems would further escalate.¹⁰⁵ A year later, Pitsuwan also addressed the notion of constructive intervention during his speech at Thammasat University (Bangkok, 12 June 1998). He argued that the principle of non-intervention had to be adjusted for allowing "ASEAN to play a constructive role in preventing or resolving domestic issues with regional implications". The 'constructive intervention' was shaped as a "form of peer pressure or friendly advice, when a matter of domestic concern poses a threat to regional stability".¹⁰⁶

While a debate was prompted on how to reconcile the idea of non-interference or non-intervention with the idea of constructive intervention, the observation can be made that the latter seems to correspond to the notion of inclusiveness. In this way, ASEAN could strive to keep all ASEAN Member States on board. Mya Than rightly observed that this idea implied that interference in internal affairs should be possible in case the region's stability or credibility was threatened by domestic issues.¹⁰⁷

The question is what kind of intervention is possible.¹⁰⁸ John Funston observed that Pitsuwan made a plea for 'flexible engagement' in order to make it more appealing to the ASEAN Foreign Ministers.¹⁰⁹ Even though the Ministers did not

¹⁰³ According to one of the respondents during the fieldwork conducted in the period from September 2009 until February 2010. Discussed in light of the lack of transparency and an improvement step by step; interview on file with the author.

¹⁰⁴ See Pushpa Thambipillai, 'Challenges to the ASEAN Way: Musyawarah and non-interference' (2000) 18 *Kajian Malaysia*, 157, p. 166, referring to Jusuf Wanandi, 'A Lesson for ASEAN' *Far Eastern Economic Review* (24 July 1997).

¹⁰⁵ Anwar Ibrahim, 'Crisis Prevention' *Newsweek* (21 July 1997), amongst others referred to by David Capie and Paul Evans, *The Asia-Pacific Security Lexicon* (updated 2nd edn, ISEAS Publishing, Singapore 2007), p. 97.

¹⁰⁶ Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAS Publications, Singapore 2005), p. 19.

¹⁰⁷ Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAS Publications, Singapore 2005), p. 19.

¹⁰⁸ Mya Than, *Myanmar in ASEAN: Regional Cooperation Experience* (ISEAS Publications, Singapore 2005), p. 19. But quiet intervention has occurred; Ibid, p. 20.

¹⁰⁹ ASEAN, *Opening Statement by His Excellency Dr. Surin Pitsuwan Minister of Foreign Affairs of Thailand at the 31st ASEAN Ministerial Meeting Manila, 24 July 1998* <https://asean.org/?static_post=opening-statement-by-his-excellency-dr-surin-pitsuwan-minister-of-foreign-affairs-of-thailand>

adopt this concept as such, they did adopt the notion of ‘enhanced interaction’. An example is the ASEAN troika for Cambodia, which constituted of the Ministers of Foreign Affairs from Indonesia, the Philippines and Thailand. The idea of constructive engagement arose again in 2009, which is described by Muntarbhorn as “avoiding hard pressure and adopting an assuaging tone”.¹¹⁰ He furthermore aptly referred to the words of the Thai Prime Minister at the inaugural ceremony of the AICHR in 2009:

Our approach is a constructive one. For ASEAN, the issue of human rights is not about condemnation, but about awareness, empowerment and improvement. Through AICHR, we shall not only demonstrate to the world that human rights is a priority, but also show them realistic and constructive ways to deal with it — through the promotion of dialogue and cooperation — starting from issues of common concerns and interests, issues relating to the humanitarian side and issues that some of us may already set good examples, so we can share and reproduce best practices throughout the region.¹¹¹

Related to this, Muntarbhorn commented during an interview with the author in 2009 that non-interference at the regional level implied that some States considered that human rights are more part of the internal affairs and not open to regional scrutiny, whereby it is key to bear in mind that this notion is raised by a few government officials, who do not define what they mean with this principle.¹¹² This still seems to be the case, as Morada observed that “[s]ome member states are more sensitive to this issue as they consider it an interference in their internal affairs and a violation of asean’s traditional norms.”¹¹³

This principle is at odds with the protection and promotion of human rights within ASEAN. Thambipillai noted that this principle is upheld in this area as Member States do not want to be criticised by fellow Member States. Hence, they do not criticise their fellow Member States in the event of human rights abuses. This corresponds to the overall picture regarding the stance of the Member States

thailand-at-the-31st-asean-ministerial-meeting-manila-philippines-24-july-1998-2> last accessed 15 September 2018 and John Funston, *ASEAN and the Principle of Non-Intervention – Practice and Prospects* (ISEAS Publishing, Singapore 2000).

¹¹⁰ Viti Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 188. Muntarbhorn hereby takes ASEAN involvement with Myanmar as an example, see pp. 187-188.

¹¹¹ ASEAN, Remarks by H.E. Abhisit Vejjajiva, Prime Minister of the Kingdom of Thailand, on the Occasion of the Inaugural Ceremony of the ASEAN Intergovernmental Commission on Human Rights (AICHR), Cha-Am Hua Hin, Thailand, 23 October 2009, available at <http://asean.org/?static_post=remarks-by-he-abhisit-vejjajiva-prime-minister-of-the-kingdom-of-thailand-on-the-occasion-of-the-inaugural-ceremony-of-the-asean-intergovernmental-commission-on-human-rights-aicrh> last accessed 15 September 2018.

¹¹² Interview with Viti Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

¹¹³ Noel L. Morada, ‘Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview’ (2016) 8 *Global Responsibility to Protect* 111, p. 127.

with respect to the core UN human rights instruments, including their position on individual complaint procedures, as Section 2 of Chapter III showed. In addition, it is shown that arbitration and dispute settlement by the ICJ is in general also not accepted, or only in case the States in disputes agree to this settlement.

Furthermore, Thambipillai remarked that proponents of this practice argue that it is bilateral sensitivity as well as harmony that are taken into account.¹¹⁴ On the other hand, Muntarhorn rightfully pointed out that the principle of non-interference needs to be read within the totality of international law, whereby he argued that this principle:

(...) is balanced and counter balanced by other principles such as human rights and importantly, international peace and security. In particular, in the international setting, the advocacy of human rights vis-à-vis a State is not seen as interference in the internal affairs of the State but is part of international jurisdiction to protect those who are not adequately protected by the country of origin. This is evident every day in the UN in the daily discourse between the UN and States in regard to the need to promote and to protect human rights, and has been particularly ostensible in a country's interrelationship with the new system known as UPR.¹¹⁵

Due to ASEAN's adherence to the principle of non-interference and State sovereignty, Morada distinguished ASEAN as a "pluralist international society",¹¹⁶ hereby referring to Alex J. Bellamy's observation:

For pluralists, the normative content of an international society is 'limited to a mutual interest in the continued existence of the units comprising the society... manifested in the reciprocal recognition of state sovereignty and the norm of non-intervention.' Pluralists also argue that an agreement among states about issues like human rights and redistributive justice is not possible even as they believe that 'moral and political codes' are rooted in specific cultural contexts and cannot be universal.¹¹⁷

The current state of affairs is that the Member States are not yet willing to scrutinise each other due to the principle of non-interference. When following

¹¹⁴ Pushpa Thambipillai, 'Challenges to the ASEAN Way: Musyawarah and non-interference' (2000) 18 *Kajian Malaysia*, 157, p. 165.

¹¹⁵ Vitit Muntarhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 184.

¹¹⁶ Noel L. Morada, 'Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview' (2016) 8 *Global Responsibility to Protect* 111, p. 115.

¹¹⁷ Alex J. Bellamy, 'Introduction: International Society and the English School' in Alex J. Bellamy (ed), *International Society and Its Critiques* (Oxford University Press, New York 2005), p. 10. As opposed to solidarists, "who consider states in an international society as having agreement or solidarity 'in developing and enforcing international law and where the use of force is considered legitimate in order to enforce the law...and the upholding of the society's moral purpose'", Noel L. Morada, 'Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview' (2016) 8 *Global Responsibility to Protect* 111, p. 115, citing Alex J. Bellamy, 'Introduction: International Society and the English School' in Alex J. Bellamy (ed) *International Society and Its Critiques* (New York, New York: Oxford University Press, 2005), p. 10.

Morada's idea of ASEAN as a pluralist international society, the ASEAN Member States cannot agree on an issue such as human rights protection. This, in turn, hampers the possibility to criticise each other's human rights abuses as agreement of human rights is lacking. However, this is at odds with international law and the notion that human rights protection cannot be considered to be part of the internal affairs of a State alone.

The principle of consensus

The origins of the principle of consensus in decision-making have been traced by a number of authors to the Javanese and Malay ideas of *musyawarah* and *mufakat* (consultation and consensus),¹¹⁸ which take place between friends and brothers.¹¹⁹

In other words, a decision must be made through a process of consultation between the ASEAN Member States in order to reach an agreement based on consensus. Its connection with other ASEAN principles becomes clear in Thambipilai's apt description:

The process [of *musyawarah* and *mufakat*] may take longer than that practiced in other (legalistic) international organisations as there is a vital need to sustain regional harmony (read: leadership harmony) in the absence of rules and procedures. The need to uphold outward unity and friendliness is of prime concern: the 'we' (united agreeable) against the 'them' (outsiders, out to destabilise us). Thus an intimate process of negotiation and *musyawarah* was necessary to arrive at an acceptable outcome 'mufakat'- without clearly revealing the extent of the division, which formalised balloting would do. [...] In short, ASEAN succumbed to the prolonged way of decision making, not addressing issues directly and openly; the process tried to accommodate varying opinions by engaging in a 'saving face' ritual. ASEAN was concerned with emphasising the process more than the substance of cooperation as the meagre end results seemed to support.

ASEAN's decision-making process by means of consensus, together with the organisation's development from an institutionally loose framework to a formalised one, is considered by its proponents as an adequate way of approaching regionalism. In this way, confrontation is avoided. The possibility to 'save face' is furthermore preserved, which appears to be vital in preserving solidarity and cohesion within the organisation.¹²⁰ In fact, according to Tan See Seng, the

¹¹⁸ See for instance ASEAN, *Opening Statement By H.E. Professor S. Jayakumar Minister for Foreign Affairs of Singapore*, 30th ASEAN Ministerial Meeting, Subang Jaya, 24-25 July 1997, <http://asean.org/?static_post=opening-statement-by-he-professor-sjayakumar-minister-for-foreign-affairs-of-singapore> last accessed 15 September 2018.

¹¹⁹ David Capie and Paul Evans, 'The ASEAN Way' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 48, refer to former Indonesian Minister H. Subandrio.

¹²⁰ Muthiah Alagappa, 'Institutional Framework. Recommendations for Change' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 22.

principle of consensus contributes to ASEAN's success as a regional organisation.¹²¹

On the other hand, it is also recognised that this is becoming a problem and that it could lead the institution towards irrelevance if left unaddressed.¹²² Nevertheless, the principle of consensus remains prevalent in ASEAN affairs. In the field of human rights, the major downside is that consensus and the subsequent practice leads to an opaque decision-making process that is uncontrollable for its people and civil society. This hampers the ability of civil society to execute a process of checks and balances and is in contrast with ASEAN's ambition to become a more people-centred organisation. With respect to this people-centrality, Hoang has observed that this is indeed more rhetoric than reality:

ASEAN by nature is intergovernmental, and is often complained as being 'elitist' and 'out of touch' with ordinary people. Over the past decade, ASEAN has been trying to connect to the grassroots through consultation and engagement with many stakeholders, especially the business people and civil society, to get their views and feedbacks in making regional policy. However, many such consultations still focus more on form than substance, especially at the Summit level.¹²³

Moreover, the process lacks a certain degree of efficiency, which is also visible in the development of a regional human rights system.¹²⁴ Related to the principle of consensus, is the observation that "the 'ASEAN Way' came to symbolise exclusion of disagreeable but perhaps important regional issues, and the inclusion of commonly acceptable and non-controversial issues, chosen of course by handful of elites".¹²⁵ Bilateral meetings have, therefore, been used instead, as they are more suitable to discuss issues that proved to be too sensitive to discuss within ASEAN.

The principle of consensus is codified in Article 20(1) ASEAN Charter. From this same article also follows that the consensus principle does not mean unanimity. Article 20(2) stipulates: "Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made". This leaves open the possibility that a decision is made on grounds other than consensus, although as said consensus is needed in order to deviate from consensus. This makes the effect of this possibility limited. Article 21 of the ASEAN Charter furthermore allows "a formula of flexible participation" in the implementation of economic commitments when consensus is reached to apply such procedure. This includes "ASEAN minus

¹²¹ See Seng Tan, 'Minilateralism: A Way out of ASEAN's Consensus Conundrum?' [2017] (5) *ASEAN Focus* 9, p. 9.

¹²² See Seng Tan, 'Minilateralism: A Way out of ASEAN's Consensus Conundrum?' [2017] (5) *ASEAN Focus* 9, p. 9.

¹²³ Thi Ha Hoang, 'Five Decades of ASEAN's Evolution' [2017] (5) *ASEAN Focus* 2, p. 3.

¹²⁴ Muthiah Alagappa, 'Institutional Framework. Recommendations for Change' in Sharon Siddique and Sree Kumar (eds), *The 2nd ASEAN Reader* (ISEAS, Singapore 2003), p. 22.

¹²⁵ Pushpa Thambipillai, 'Challenges to the ASEAN Way: Musyawarah and non-interference' (2000) 18 *Kajian Malaysia* 157, p. 161.

X formula”, which is described as a “coalition of the willing”¹²⁶ that “enables economic liberalisation between two or more ASEAN states so long as the remaining member countries agree to come on board at a later stage”.¹²⁷ In other words, there must be a consensual decision of all Member States that states that ASEAN can come to a decision that is not based on unanimity. This truly reflects Noordin Sopiee’s observation that consensus in the ASEAN context means “agreeing to disagree without being disagreeable”.¹²⁸

4 CONCLUSION

Given the size of and diversity on the Asian continent, Asia cannot be captured in one organisation. This chapter shows that ASEAN was one of the regional alliances that were formed in Southeast Asia. ASEAN hereby proved to be a key organisation in the region. This chapter focuses on ASEAN’s integration, which eventually led to the inclusion of human rights as one of the topics of cooperation, and the challenges that ASEAN faces in pursuing their increased level of integration. From this analysis, ASEAN’s *modus operandi* was deduced, which was further analysed in the remainder of this chapter.

While the organisation commenced as a security organisation bringing together like-minded States, regional cooperation among the ASEAN Member States intensified both in substance, as well as in level of formality, which is captured in the different ASEAN instruments as discussed in Subsection 2.2. In addition, ASEAN expanded in terms of membership, adding to the diversity among its Members. Political solidarity, implementing agreements, cooperating at a more intensified level, and ensuring compliance proved to be a challenge to the organisation.

Evolving from loose and informal methods of cooperation, the basis of their cooperation is nowadays more solidified in the ASEAN Charter and further developed in the roadmaps (further discussed in the following chapter in relation to human rights). This embodies the ambition to grow from cooperation to integration.

Although the ASEAN Charter provides the organisation legal personality and divides the areas of cooperation in the ASEAN Political Security Community, ASEAN Economic Community and the ASEAN Socio-Cultural Community, most important for this research is the inclusion of a human rights system. Indeed, the ASEAN Charter led to the adoption of the ASEAN Human Rights Body alongside the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children and ASEAN Committee on the Implementation of the ASEAN

¹²⁶ David Capie and Paul Evans, *The Asia-Pacific Security Lexicon* (updated 2nd edn, ISEAS Publishing, Singapore 2007), p. 41.

¹²⁷ See Seng Tan, ‘Minilateralism: A Way out of ASEAN’s Consensus Conundrum?’ [2017] (5) *ASEAN Focus* 9, p. 9.

¹²⁸ Cited in David Capie and Paul Evans, *The Asia-Pacific Security Lexicon* (updated 2nd edn, ISEAS Publishing, Singapore 2007), p. 14, hereby referring to Michael Richardson, ‘Alliance Prefers Informal Consensus’ *The Globe and Mail* (Toronto, 7 June 1997), p. A19.

Declaration on the Protection and Promotion of the Rights of Migrant Workers, as well as the adoption of the organisation's own general human rights declaration and human rights declarations that focus on vulnerable groups. However, the reference to the national level and particularities as well as principles of the ASEAN Way continue to be visible in ASEAN and pose an important challenge. While the ASEAN Way is analysed in the previous section, the other elements are further scrutinised in relation to human rights in the following chapter.

With respect to the ASEAN Way, the ASEAN documents discussed reveal a number of reoccurring values and goals. They can be summarised as equal partnership, good understanding, good neighbourliness, mutual trust, confidence building and mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of each Member State, the right of every State to lead its national existence free from external interference, subversion or coercion, self-determination and non-interference in the internal affairs of one another, preventive diplomacy, peaceful settlement of differences and disputes, renunciation of the threat or use of force, and effective cooperation based on dialogue, consultation and consensus.

Although they are – naturally – not only typical for ASEAN, the way in which they are intertwined and interpreted displays distinct features, which is captured in the ASEAN Way, which in turn is always present in ASEAN affairs. According to this *modus operandi*, it is often said that the developments within ASEAN proceed on the basis of the lowest common denominator. This is described as the level of comfort to which all Member States agree. This chapter illustrates that the ASEAN Way is in fact subjected to an ongoing reinterpretation and that changes within this ASEAN Way have taken place.

The inclusion of human rights on the agenda of ASEAN also implies that the traditional interpretation of these ASEAN values has to be reinterpreted, such as the principle of non-interference. Reinterpreting the values in a less strict manner is necessary in order to implement the Roadmap for ASEAN until 2025, and in particular with respect to the promotion and protection of human rights. ASEAN claims that it strives to become, and ultimately be, a people-oriented, outward-looking community. This necessitates a reinterpretation of the ASEAN Way, as this *modus operandi* is very much a State centric one.

While proponents of the ASEAN Way argued that it has benefitted ASEAN, this chapter shows that this *modus operandi* overall negatively affects the possibilities for the development of a meaningful human rights system. In particular, the ASEAN Way affects the substantive element of human rights, as well as the mechanisms to protect and promote human rights and the question whether ASEAN's human rights system is building upon, or detracting from, the universality of human rights at the level of concepts, conceptions and implementation. This is further scrutinised in the following chapter.

CHAPTER V

ASEAN AND HUMAN RIGHTS

1 INTRODUCTION

The previous chapter showed that ASEAN took steps to embrace more areas of cooperation, including human rights. It demonstrated that this commitment is mirrored in a number of ASEAN instruments, which resulted in the adoption of an ASEAN Human Rights Declaration and the creation of three regional human rights bodies. According to Michael Vatikiotis, adherence to ASEAN's principles is important. This includes respect for fundamental freedoms and the promotion and protection of human rights and social justice (Article 2(i) ASEAN Charter):

It is important [...] for ASEAN not to lose sight of the principles enshrined in the ASEAN Charter, which in its preamble declares respect for and protection of human rights and fundamental freedoms. One key reason for this is that for ASEAN to continue to serve as the cornerstone of regional socio-economic cooperation and security, there must be a framework of norms and values to which member states are expected to adhere.¹

This chapter scrutinises ASEAN's cooperation and initiatives in the field of human rights. Discussions in the ASEAN region revolved around universalism and relativistic attitudes in the form of 'Asian values' in the early 1990's, which affected the development of ASEAN's regional human rights system. Therefore, these issues are first addressed before moving on to ASEAN's human rights system.

2 HUMAN RIGHTS AND ASEAN: UNIVERSALISM, RELATIVISM AND ASIAN VALUES

The contextualisation of human rights in Southeast Asia took place within the debate on the universality of human rights and relativistic attitudes towards these rights. Chapter II showed that while universalism and cultural relativism were initially brought as each other's extremes on the spectrum of the universality of human rights, it might be better to use Donnelly's idea of relative universality in which this dichotomy is circumvented. From this follows that while the universality

¹ Michael Vatikiotis, 'ASEAN Needs to Embrace Human Rights' [2017] (5) *ASEAN Focus* 11, p. 11.

of human rights is the common goal, human rights can be relative in various ways. Consequently, there is room for certain particularities.

Relativism in the Southeast Asian region was initially proposed by a limited number of States in the Asian values debate. This debate reached its peak in the early 1990s and was mainly led by the former Singaporean and Malaysian Prime Ministers, respectively Lee Kuan Yew and Mahathir Mohamad. They argued that human rights were a Western concept too distant from Asian ideas on the individual and its role within society. Alternatively, they argued for an Asian approach towards human rights, mainly based on a different balance between the individual and society.

When looking back at the 1993 World Conference in Vienna in relation to relativistic viewpoints that were present in the ASEAN region (see also Chapter II, Section 3.4), Muntarbhorn made the following observation:

Governments were quite willing to advocate at that time regional particularities of certain rather ethnocentric kind or slightly Asian centric kind, while the NGOs themselves were taking a more universal approach. What happened in the Vienna World Conference is that we had this famous paragraph whereby while of course one recognises to some extent the regional particularities, it is the duty of all countries to abide by human rights and international law, so it is the prevalence of international standards over regional particularities, as accepted by everyone in Vienna. But regional particularities, so to speak, is a sort of expression of various concerns in the region, sometimes put as Asian values, but I think that, as I said, while both the terms particularities and values are raised periodically, today they are less raised than before 1997.²

Leena Avonius and Damien Kingsbury observed that parts of the Bangkok Declaration expressed the main issues of what was brought forward as Asian values, that is to say, the right to self-determination that is linked to the policy of non-interference, claims to cultural specificity and prioritising economic development,³ thus also including an element which is overall linked to the ASEAN Way. An ASEAN spokesperson characterised societies based on Asian values “as disciplined group-oriented rather than atomised, and valuing duty to the community over the assertion of rights. These societies are further said to feature consensus-seeking and a deferential respect for public officials and institutions in the interest of public hegemony”.⁴

According to Muntarbhorn, the Asian values argument in essence revolves around the idea that “individuals do not take precedence over the interests of the

² Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

³ Leena Avonius and Damien Kingsbury, ‘Introduction’ in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Palgrave Macmillan, New York 2008), p. 4.

⁴ Liann Thio, ‘Implementing human rights in ASEAN countries: “Promises to keep and miles to go before I sleep”’ (1999) 2 *Yale Human Rights and Development Law Journal* 1, p. 2.

family and community and the decision-making power of governments or States”.⁵ Other values that were brought forward as ‘Asian values’ during the Asian values debate of the early and mid-1990s are hard work, respect for authority, strong family ties, reverence for education, thrift, teamwork, balance between the individual’s interests and those of society, modesty, integrity and desire for continuous improvement.⁶ This being said, it is relevant to note that these values were explicitly brought forward prior to the economic crisis of 1997-98. Muntarbhorn commented in this respect as follows:

If you look at the literature later, it does not get into those specifics so much. It is only some countries that raise them. But all this was dampened with the economic crash, because some ASEAN authorities were very confident about themselves before 1997, they were less confident after the economic crash of 1997. That is why, I think, you don’t find ultra-advocacy of Asian values or ASEAN values today, unlike in the pre-1997 period. And certainly some governments would try to erase or block reference to Asian values.⁷

As said before, Asian values were emphasised by only a limited number of States. This was, in fact, one of the points of critique on the Asian values debate. In particular, although known as Asian values, the term is misleading with respect to the geographical scope it refers to. Amartya Sen pointed out that “cultural diversity and heterogeneity of the population throughout Asia makes the existence of some quintessential values separating Asians as a group of people from the rest of the world impossible”.⁸ Indeed, while Asian values were proposed as values commonly shared by Asian States, Kim Dae Jung, former President of South Korea, was for instance fiercely opposed to these anti-democratic values.⁹ Related to this, Muntarbhorn commented that “if you use the term Asian values, you are falling into the trap of abiding by the opinions of two or three countries, rather than the more diverse opinions from countries at large, as well as NGOs”.¹⁰ In addition, others have observed that one can speak of Asian exceptionalism, or an “identitarian exceptionalism”, “highlighting the particular ‘nature’ of Asia, where the

⁵ Vitit Muntarbhorn, *Asian Perspective on Human Rights: Perceptions Programmes and Practices* (Office of the High Commissioner on Human Rights, Bangkok 2002), p. 7.

⁶ Liann Thio, ‘Implementing human rights in ASEAN countries: “Promises to keep and miles to go before I sleep”’ (1999) 2 *Yale Human Rights and Development Law Journal* 1, p. 2.

⁷ Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

⁸ Leena Avonius and Damien Kingsbury, ‘Introduction’ in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Palgrave Macmillan, New York 2008), p. 7.

⁹ Dae Jung Kim, ‘Is Culture Destiny? The Myth of Asia’s Anti-Democratic Values’ *Foreign Affairs*, (November/December 1994), <<https://www.foreignaffairs.com/articles/southeast-asia/1994-11-01/culture-destiny-myth-asias-anti-democratic-values>> last accessed 19 September 2018.

¹⁰ Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

coexistence of so many religions, cultures, and traditions has prevented the creation of a unique Asian identity”.¹¹

Diverging stances were indeed present in the ASEAN region as Member States such as Indonesia, the Philippines and Thailand favoured universal human rights. Rafendi Djamin noted in this respect that some people in power used the term ‘Asian values’ as a justification when human rights abuses occurred.¹² Medina observed that the Asian values argument was never accepted by the Philippine and Indonesian Governments. Instead, it was pushed by some countries, whereby the rest of the world assumed that the whole of Southeast Asia thought in that way.¹³ The Suharto period in Indonesia and the Marcos period in the Philippines, during which human rights were severely impeded, might explain the attitude of these States. After Suharto’s and Marcos’ fall, the call for democracy, the rule of law and human rights came from the citizens themselves.

The stress on human rights was at times considered as a new form of Western imperialism. It was observed by one of the respondents during the fieldwork in 2009 that some of the governments of ASEAN Member States “are weary of human rights, because human rights is [sic: are] associated with Western interference”.¹⁴ According to this respondent, these States were at that time “Laos, Vietnam, maybe Cambodia, Myanmar, Brunei [Darussalam]. (...) Malaysia is improving. Singapore is also improving, because there are more civil society groups”.¹⁵

As Thailand was not colonised by Western powers, its experience with this then newly considered form of Western influence was different from its fellow ASEAN Member States that had been colonised. This could explain why Thailand also did not adopt the Asian values argument and instead sided with Indonesia and the Philippines. Other Member States, which were either non-democratic or democratic

¹¹ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 392 conform Ben Saul, Jacqueline Mowbray and Irene Baghoomians, ‘Resistance to Regional Human Rights Cooperation in the Asia-Pacific: Demythologizing Regional Exceptionalism by learning from the Americas, Europe and Africa’ in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region. Towards Institution Building* (Routledge, London 2011).

¹² Interview with Rafendi Djamin, Regional Director for South East Asia and Pacific of Amnesty International and former Executive Director of the Human Rights Working Group as well as former Indonesian Representative for the ASEAN Intergovernmental Commission on Human Rights from 2009-2015 (Jakarta, 19 October 2009).

¹³ Interview with Carlos Medina, Director of the Ateneo Law Faculty’s Human Rights Center at Ateneo de Manila University (Manila, 10 November 2009).

¹⁴ According to one of the respondents during the fieldwork conducted in the period from September 2009 until February 2010. Interview on file with the author.

¹⁵ According to one of the respondents during the fieldwork conducted in the period from September 2009 until February 2010. Interview on file with the author. According to Davies, the following categorisation in terms of progressiveness towards human rights can be made. Progressive are Indonesia and the Philippines, the middle category consists of Malaysia, Singapore and Thailand, while the conservative States are Cambodia, Laos, Myanmar, Vietnam, and Brunei Darussalam; Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 112.

with severe restrictions, were hesitant of or opposed human rights and the development of a regional human rights system.

From this follows that the Asian values argument was used as a political tool. In this respect, Muntarbhorn's observation that "a major concern is not only the content of what constitutes Asian values but also "who is making the argument?"¹⁶ is relevant. He observed that "the danger of this argument is that it is a viewpoint instrumentalised by less liberal or authoritarian governments or regimes for their own political end and survival rather than the genuine interests of individuals and communities".¹⁷ In this respect, Kofi Annan's commented:

[I]t was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western or Northern imposition. It was often their leaders who did so.¹⁸

Related to this, Muntarbhorn made the following observations based on his work as Special Representative of the UN Secretary General for human rights in Cambodia:

I would add that during my years as Special Representative of the UN Secretary General for human rights in Cambodia, I had numerous occasions to discuss those rights with oppressed and poor people. I was struck by the way in which they, in particular women, powerfully put their problems in terms of human rights. Not once was I told these rights were "Western" and irrelevant to them; not on a single occasion did my interlocutors refer to "Asian values" as opposed to human rights.¹⁹

Nonetheless, Muntarbhorn does not deny that there are "Values in Asia", which he summarised as guardian values.²⁰ Examples are compassion, non-violence, and respect for other human beings and the natural environment, but he stressed that these values are rather universal in content rather than ethnocentric in emphasis.²¹

Alongside the criticism of being a political tool, the Asian values debate lacks a solid (philosophical) foundation. In fact, on the one hand, the ASEAN Member States argued that the ASEAN Members are historically, politically and religiously speaking diverse. Specifically, they underlined the achievement of ASEAN to unify

¹⁶ Vitit Muntarbhorn, *Asian Perspective on Human Rights: Perceptions Programmes and Practices* (Office of the High Commissioner on Human Rights, Bangkok 2002), p. 8.

¹⁷ Vitit Muntarbhorn, *Asian Perspective on Human Rights: Perceptions Programmes and Practices* (Office of the High Commissioner on Human Rights, Bangkok 2002), p. 8.

¹⁸ Quoted by Peter Leuprecht, 'Universality and Diversity' in Colleen Sheppard and François Crépeau (eds), *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p. 9.

¹⁹ Peter Leuprecht, 'Universality and Diversity' in Colleen Sheppard and François Crépeau (eds), *Human Rights and Diverse Societies: Challenges and Possibilities* (Cambridge Scholars Publishing, Newcastle upon Tyne 2013), p.10.

²⁰ Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

²¹ Vitit Muntarbhorn, *Asian Perspective on Human Rights: Perceptions Programmes and Practices* (Office of the High Commissioner on Human Rights, Bangkok 2002), p. 8.

these different Member States, thereby maintaining peace and security. On the other hand, within the Asian values debate a number of the ASEAN Members stressed the common values which the States have. It was argued that these values should form the basis of a human rights system specific to the region and which would be different from the Western approach of human rights protection and promotion. These viewpoints seem to be difficult to coincide.

As mentioned before, the stress on Asian particularities peaked in the early 1990s. Muntarbhorn observed that “[i]t has been less advocated since then, but there are still some proponents”, although this is done on a lower profile than before.²² This appeal to Asian values was sparked again by Kishore Mahbubani around 2007, who received international attention for making this argument. Avonius and Kingsbury also noted that “incongruence between human rights rhetoric and practice remain commonplace in Asian countries”²³ and that although the 1997 Asian financial crisis was assumed to set aside the Asian values argument, ten years later Asian States still continue to suppress political protests in name of national stability.²⁴

Given the stress on Asian values by certain ASEAN Member States in the past and relativistic attitudes in ASEAN documents, field research was conducted in the ASEAN region in the early stages of this research in 2009-10 (see more details in Section 3 of Chapter I on the methodology of this research). From this field research, the following can be concluded.

When applying the notions of universalism and relativism (discussed in Section 3.1 of Chapter II) to the ASEAN region, the field study pointed out that the ASEAN region was a mix of universalistic and relativistic ideas, although it was observed that the ASEAN Member States were in general moving more towards a universalistic attitude towards human rights. While a high number of the respondents were of the opinion that there is a Southeast Asian context in which human rights should be interpreted, it was difficult to clarify what this context comprises.

Values that have been brought forward as Asian values during the Asian values debate in the early and mid-1990s were often not considered as legitimate factors by the respondents in the human rights debate. In line with the literature, the respondents generally also questioned whether these values are typically Asian, or whether this was only an impression. In line with the observations made above, it was noted that Asian values were brought forward by especially Malaysia and Singapore as seemingly regionally shared values, while they were in fact not

²² Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

²³ Leena Avonius and Damien Kingsbury, ‘Introduction’ in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Palgrave Macmillan, New York 2008), p. 6.

²⁴ Leena Avonius and Damien Kingsbury, ‘Introduction’ in Leena Avonius and Damien Kingsbury (eds), *Human Rights in Asia. A Reassessment of the Asian Values Debate* (Palgrave Macmillan, New York 2008), p. 6.

adopted as regional values by all ASEAN Member States. It was difficult to determine a certain distinctiveness, because Asian values were not echoed in all ASEAN Member States due to the diversity within the region and each Member State. Respondents did not always agree with each other if and how the Asian values argument was used in their respective State and what the content of these values was. This is contradictory to the geographical scope the Asian values argument implied.

The argument made by NGOs is also in line with literature. Instead of focussing on how particularities could be taken into account while respecting human rights standards, the Asian values debate was often used politically. Specifically, Asian values were according to NGOs often used as an excuse for governments for not yet complying with certain human rights standards. This explains why Cambodia, Laos, Myanmar and Vietnam, which are generally considered to be more conservative when it comes to human rights, also sided with Malaysia and Singapore. For them, these values became also an excuse for not yet complying with international human rights standards.

3 THE INCLUSION OF HUMAN RIGHTS IN ASEAN'S KEY DOCUMENTS

3.1 Introduction

The previous chapter provided a short account of ASEAN's integration. Although ASEAN started as a security organisation, during ASEAN's gradual development it also became possible to incorporate human rights into its structure. This section focuses on the way in which human rights became entrenched in the organisation. In line with ASEAN's integration, the inclusion of human rights followed an evolutionary path. Important to bear in mind is Muntarhorn's observation that ASEAN is a political and security organisation with economic leaning, rather than a human rights organisation. This, he rightfully argued, brings about another mind-set.²⁵

This section shows that human rights topics are addressed in numerous ASEAN instruments. In these documents, human rights are dealt with in general or according to different themes, in terms of universal concerns, or under the heading of different vulnerable groups. As addressed in the previous section, relativism in the form of Asian values mainly flourished in the early 1990s until the Asian economic crisis of 1997-98 and entailed a call for Asian particularities that seemed to move away from the universalist human rights framework. Yet, human rights initiatives were taken up in the ASEAN region in the same period. This bodes the question what the motives were for including these human rights initiatives. In order to attain a better insight into the divergence between, what seems, political

²⁵ Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009). Muntarborn put the issue in a different angle, by asking the question "Is NATO, for example, to address human rights?".

rhetoric and actual formal acceptance, key ASEAN instruments addressing human rights are studied in a chronological order.

A number of these documents date from the period before the ASEAN Ministers stated their ambition to develop a common approach to human rights in 1993. Nevertheless, this year can be used as a general starting point, as a common general stance on human rights was first expressed during the 1993 ASEAN Ministerial Meeting. This was followed by numerous declarations, resolutions and other documents over the years. They show that the recent human rights initiatives in the form of a human rights declaration, and the establishment of the ASEAN Intergovernmental Commission on Human Rights, the ASEAN Commission on Women and Children and ASEAN Committee on Migrant Workers are not isolated efforts but part of ASEAN's initiatives on human rights over the years.

Section 2 of Chapter IV scrutinised ASEAN's integration towards an ASEAN Community. In this section, a specific focus lies on the evolutionary approach towards the inclusion of human rights as topic of common concern.

3.2 ASEAN's human rights (oriented) instruments

As early as 1976, the Declaration of ASEAN Concord (Bali Concord I, 1976) addressed topics of cooperation in economic and social development, which also related to human rights. The Declaration stated amongst others the following: "The elimination of poverty, hunger, disease and illiteracy is a primary concern of member states. They shall therefore intensify cooperation in economic and social development, with particular emphasis on the promotion of social justice and on the improvement of the living standards of their peoples."²⁶

While this appears to be a human rights-oriented objective, this objective was part of ASEAN's cooperation "in the pursuit of political stability",²⁷ one of ASEAN's core objectives. This Declaration mentioned six programmes of action: political, economic, social, cultural and information, security and improvement of the ASEAN machinery. The social area was relevant for human rights as well, as it mentioned cooperation in the area of social development, in which low-income groups and the rural population were accentuated. It also attributed special attention to women and youth, who continue to be key focal points of the organisation and are the focus of the ASEAN Commission on Women and Children.

In the years after, ASEAN has been characterised by a growing cooperation, whereby certain areas of cooperation are linked to human rights. Such functional cooperation was one of the topics addressed in the 1987 Manila Declaration. Areas of cooperation that were openings for cooperation in the field of human rights were,

²⁶ ASEAN, *Declaration of ASEAN Concord*, Bali, 24 February 1976, point 3. <https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976> last accessed 19 September 2018.

²⁷ ASEAN, *Declaration of ASEAN Concord*, Bali, 24 February 1976, general declaration <https://asean.org/?static_post=declaration-of-asean-concord-indonesia-24-february-1976> last accessed 19 September 2018.

inter alia, the increase of cooperation on health, the prevention of drug abuse and drug trafficking, labour, law, population, the welfare and survival of the child and socio-cultural programmes.²⁸ A number of these topics are still relevant and enshrined in the ASEAN Human Rights Declaration and topic of common concern on which ASEAN's human rights commissions and committee are mandated.

By the mid-1980s until the mid-1990s, other States joined ASEAN. Furthermore, the Asian values debate reached its peak and the Vienna Declaration and Programme of Action was formulated. Nevertheless, human rights topics were increasingly addressed. The 1988 Declaration of the Advancement of Women in the ASEAN Region was ASEAN's first specific human rights declaration.²⁹ The Declaration was based on the acknowledgment that women fulfil numerous roles in society and that they should be able to participate and integrate actively in the region. In referring to the Manila Declaration, the ASEAN Ministers agreed that each Member State should make an effort to promote and implement equitable and effective participation of women in all spheres of life at the national, regional and international level. Women should be enabled to play a role and benefit from national and regional development. Member States should also include specific concerns for women in national plans, design and promote programmes, which reach to community and nongovernmental women organisations and promote harmonisation of views on women concerns.³⁰

Four years later, the 1993 Resolution on the ASEAN Plan of Action for Children was adopted.³¹ This Resolution referred to initiatives taken at the international level, specifically, the 1990 World Declaration on the Survival, Protection and Development of Children and the accompanying Plan of Action.³² Dealing with children (*i.e.* persons under 18 years), the Plan of Action stipulated child survival, protection, and development as its three priority areas. Specific issues and strategies were addressed, which included poverty and lack of access to basic needs and services, child abuse and trafficking, specific needs of children such as education and recreation. These policies were concerned with advocacy, networking,

²⁸ ASEAN, *Manila Declaration*, Manila, 15 December 1987, Article 19 available at <https://asean.org/?static_post=manila-declaration-philippines-15-december-1987> last accessed 19 September 2018.

²⁹ ASEAN, *Declaration of the Advancement of Women in the ASEAN Region*, Bangkok, 5 July 1988 <https://asean.org/?static_post=declaration-of-the-advancement-of-women-in-the-asean-region-bangkok-thailand-5-july-1988> last accessed 19 September 2018.

³⁰ ASEAN, *Declaration of the Advancement of Women in the ASEAN Region*, Bangkok, 5 July 1988 <https://asean.org/?static_post=declaration-of-the-advancement-of-women-in-the-asean-region-bangkok-thailand-5-july-1988> last accessed 19 September 2018.

³¹ The resolution was prompted by the Fourth ASEAN Summit (Singapore, 27-29 January 1992), during which the development of children in ASEAN's functional cooperation was amongst others addressed, and adopted on 2 December 1993; ASEAN, *Resolution on the ASEAN Plan of Action for Children*, Manila, 2 December 1993 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1993-Resolution-On-The-ASEAN-Plan-Of-Action-For-Children-pdf.pdf>> last accessed 19 September 2018.

³² Agreed to at the UN World Summit for Children, see UN World Summit for Children, *Declaration on the Survival, Protection and Development of Children and Plan of Action* UN Doc. A/45/625, annex 18 October 1990.

information sharing, training, and research. Alongside these initiatives, the Plan of Action called for the designation of Desk Officers for Children.³³

At the height of the Asian values debate, a Joint Communiqué was issued by the Foreign Ministers at the 26th ASEAN Ministerial Meeting (Singapore, 23-24 July 1993). This Joint Communiqué was the first official document that revealed a common ASEAN position on human rights. In order to grasp the sentiments at that time, these political statements can be read best in their original words:

16. The Foreign Ministers welcomed the international consensus achieved during the World Conference on Human Rights in Vienna, 14-25 June 1993, and reaffirmed ASEAN's commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993. They stressed that human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances. They emphasized that the promotion and protection of human rights should not be politicized.

17. The Foreign Ministers agreed that ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights. They noted that the UN Charter had placed the question of universal observance and promotion of human rights within the context of international cooperation. They stressed that development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights. They emphasized that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states. They were convinced that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights.

18. The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June

³³ ASEAN, *Resolution on the ASEAN Plan of Action for Children*, Manila, 2 December 1993 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1993-Resolution-On-The-ASEAN-Plan-Of-Action-For-Children-pdf.pdf>> last accessed 19 September 2018.

1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.³⁴

These statements captured ASEAN's position on human rights, whereby they also stressed that human rights should not be politicised, nor be used as a condition for economic cooperation and development assistance. In addition, they acknowledged the importance of a regional approach and taking into account the regional context. Principles that are part of the ASEAN Way (explained in Section 3 of Chapter IV) were explicitly mentioned.

It appears that ASEAN was divided about human rights, as the ASEAN Way does not seem to be open for thoroughgoing regional human rights cooperation, most notably protection and the redress of human rights violations. In addition, this Communiqué was issued in the early 1990s, the time when the Asian values debate reached its peak. As is shown in the previous section, this Asian values argument was often used by some States as a reason for not complying with international human rights standards, thus ensuring that these standards were lowered. Muntarbhorn observed that "[i]n essence, this [agreement that ASEAN should consider the establishment of an appropriate mechanism] was a nominal gesture rather than a substantive comment".³⁵

The 1997 Asian financial crisis uncovered weaknesses in the ASEAN region and struck the region's economy and stability. As stated before, it was generally believed that the principle of non-interference was a reason for the failure of ASEAN Member States to engage with the causes and consequences of this crisis.³⁶ The explicit stress on Asian values faded into the background with this financial crisis. The focus on women and children continued, and other vulnerable groups were addressed as well. Reference was made to the international human rights framework, for example to it strives to become, and ultimately be, the CEDAW and the CRC to which all the ASEAN Member States were already party at that time.

The 1997 Hanoi Plan of Action (HPA) mainly focused on economic and financial cooperation instead of human rights. Davies commented in this regard that the HPA mentioned a need to "enhance [the] exchange of information in the field of human rights", but that it did no more than that.³⁷ Nevertheless, the HPA also contained initiatives relevant for human rights. Activities primarily involved rural development, poverty eradication (Chapter IV) and education (Chapter V). In addition, it focused on human trafficking in and violence against women and

³⁴ ASEAN Ministerial Meeting, *Joint Communiqué of the 26th ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993, paras. 16-18 <http://asean.org/?static_post=joint-communicue-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993>, last accessed 10 September 2018

³⁵ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 108.

³⁶ Mathew Davies, 'The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration' (2013) 14 *Georgetown Journal of International Affairs* 51, p. 52.

³⁷ Mathew Davies, 'Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights' (2013) 26 *The Pacific Review* 385, pp. 387-391.

children, as well as the care for the elderly and the disabled, thereby setting the stage for ASEAN's future ongoing focus on vulnerable people. The HPA also focused on youth and youth employment, who were also addressed earlier in the 1997 Kuala Lumpur Agenda on ASEAN Youth Development and after the HPA, such as the Yangon 2000 Declaration on Preparing ASEAN Youth for the Challenges of Globalisation.

The Hanoi Plan of Action mentioned the implementation of the ASEAN Plan of Action for Children and trafficking, crimes, and violence against women and children.³⁸ Furthermore, the exchange of information in the field of human rights between the Member States should be increased in order to promote and protect all human rights,³⁹ without specifying what this meant. Alongside the regional framework, the international human rights regime was also addressed. "The promotion and protection of all human rights and fundamental freedoms of all peoples in accordance with the Charter of the United Nations, the Universal Declaration on Human Rights and the Vienna Convention and Programme of Action"⁴⁰ and "the full implementation of the Convention in the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination" were stressed.⁴¹ The table in Annex 1 shows that all ASEAN Member States, except for Brunei Darussalam, were in fact party to the CEDAW and CRC around the time of the adoption of the VAP. Due to these focal points, it is observed that the HPA "started to invoke human rights more directly".⁴²

The ASEAN Declaration on Transnational Crime (1997)⁴³ deals with various sorts of transnational crime like issues on narcotics and economic crimes, but also focuses on illegal migration and trafficking of people. This document is one of the relevant documents for the ASEAN Committee on Migrant Workers.

The Declaration on the Commitments for Children in ASEAN (2001) focused, generally speaking, on "the survival, development, protection and participation of children",⁴⁴ whose rights have to be protected, recognised and respected "through

³⁸ ASEAN, *Hanoi Plan of Action*, Hanoi, 15 December 1998, Articles 4.4 and 4.5 <https://asean.org/?static_post=hanoi-plan-of-action 2018> last accessed 15 September 2018.

³⁹ ASEAN, *Hanoi Plan of Action*, Hanoi, 15 December 1998, Article 4.8 <https://asean.org/?static_post=hanoi-plan-of-action 2018> last accessed 15 September 2018.

⁴⁰ ASEAN, *Hanoi Plan of Action*, Hanoi, 15 December 1998, Articles 4.8 and 4.9 <https://asean.org/?static_post=hanoi-plan-of-action 2018> last accessed 15 September 2018.

⁴¹ ASEAN, *Hanoi Plan of Action*, Hanoi, 15 December 1998, Article 4.9 <https://asean.org/?static_post=hanoi-plan-of-action 2018> last accessed 15 September 2018.

⁴² Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 113.

⁴³ ASEAN, *ASEAN Declaration on Transnational Crime*, Manila, 20 December 1997 <http://asean.org/?static_post=asean-declaration-on-transnational-crime-manila-20-december-1997> last accessed 19 September 2018.

⁴⁴ ASEAN, *Declaration on the Commitments for Children*, Singapore, 2 August 2001, Article 1 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2001-Declaration-on-the-Commitments-for-Children-in-ASEAN.pdf>> last accessed 19 September 2018.

mutual sharing of information on the rights of children by ASEAN members”.⁴⁵ Many of the provisions of this Declaration repeated the 1992 ASEAN Plan of Action for Children.

The 2004 Declaration on the Elimination of Violence Against Women in the ASEAN Region asserted in its preamble that, in accordance with the 1995 Beijing Declaration and Platform for Action,⁴⁶ “violence against women is an obstacle to the achievement of equality, development and peace” as well as a violation of human rights.⁴⁷ In order to tackle violence against women, the Member States should “promote an integrated and holistic approach”.⁴⁸ Alongside a number of concrete actions, the Declaration included four focus areas: (a) providing appropriate services to survivors, (b) dealing adequately with offenders, (c) understanding the violence and its causes, and (d) changing social outlooks and conduct.⁴⁹

The wording in the document is cautious, given the use of words such as ‘encourage’, ‘promote’ and ‘intensify efforts’. On the other hand, a significant distinction between the 1988 Declaration and this Declaration is that the latter instructs Member States to enact, reinforce and amend their national legislation on violence against women, which should also include investigation to, and prosecution, sentencing and rehabilitation of perpetrators.⁵⁰ In this respect, the ASEAN notions of State sovereignty and non-interference in the internal affairs of a State, seem to become less dominant. In addition, the national level is subjected to the regional level. From Chapter III it follows that this kind of subjection does not come naturally to the ASEAN Member States.

Women and children continued to be a focal point for ASEAN with the 2004 ASEAN Declaration Against Trafficking in Persons Particularly Women and Children.⁵¹ This Declaration specified measures to address the trafficking of

⁴⁵ ASEAN, *Declaration on the Commitments for Children*, Singapore, 2 August 2001, Article 4 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2001-Declaration-on-the-Commitments-for-Children-in-ASEAN.pdf>> last accessed 19 September 2018.

⁴⁶ Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, UN Doc. A/CONF.177/20, 17 October 1995.

⁴⁷ ASEAN, *Declaration on the Elimination of Violence Against Women in the ASEAN Region*, Jakarta, 30 June 2004, preamble <https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4> last accessed 19 September 2018.

⁴⁸ ASEAN, *Declaration on the Elimination of Violence Against Women in the ASEAN Region*, Jakarta, 30 June 2004, Article 2 <https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4> last accessed 19 September 2018.

⁴⁹ ASEAN, *Declaration on the Elimination of Violence Against Women in the ASEAN Region*, Jakarta, 30 June 2004, Article 2 <https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4> last accessed 19 September 2018.

⁵⁰ ASEAN, *Declaration on the Elimination of Violence Against Women in the ASEAN Region*, Jakarta, 30 June 2004, Article 4 <https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4> last accessed 19 September 2018.

⁵¹ ASEAN, *ASEAN Declaration Against Trafficking in Persons Particularly Women and Children*, Vientiane, 29 November 2004 <<https://asean.org/asean-declaration-against-trafficking-in-persons-particularly-women-and-children-4/>> last accessed 19 September 2018.

persons, but could go only as far as these measures were allowed by domestic laws and policies. Concrete measures included the establishment of a regional focal network to address the problem, information sharing, increased cooperation between the Member States' immigration and other law enforcement authorities, the protection of the human dignity and rights of the victims, and the commitment to take measures against the perpetrators. ASEAN is rather opaque in reporting about the concrete progress on the measures included in the Declaration.

While the topic of human rights was discussed by NGOs from the mid-1990s, especially the Working Group for an ASEAN Human Rights Mechanism, the ASEAN Member States increased their cooperation on human rights after the turn of the millennium. Indonesia, the Philippines and Thailand were hereby in the lead. Other States also started to appreciate the value of having a mechanism, but according to Muntarbhorn, "perhaps more introspectively, in terms of, assessing ourselves in the face or in the interface of international scrutiny. [...] They felt it was a value added to have something from the region, rather than just listening to the outside all the time".⁵²

The 2005 Vientiane Meeting is considered key for the inclusion of human rights as one of the areas of cooperation,⁵³ as ASEAN was reluctant to talk about rights before the Vientiane Action Programme.⁵⁴ With the signing of the VAP "human rights came to occupy an important and, from that point on, constant role in ASEAN's discussions about regional reform".⁵⁵ Human rights were positioned in the ASEAN Security Community, although topics related to human rights are also addressed in the ASEAN Socio-Cultural Community. According to Davies, this could be explained because "ASEAN linked its traditional goals, achieved through stoic non-interference, with an interest in human rights where all the evidence pointed to the defence of human rights as being inimitable to non-interference".⁵⁶

Specifically, the promotion of human rights within the ASEAN Security Community should include the following actions according to the VAP:

⁵² Interview with Vitit Muntarbhorn, Professor Emeritus of Law, Chulalongkorn University (Manila, 13 November 2009).

⁵³ Medardo Castillejos Abad Jr, 'The Association of Southeast Asian Nations. Challenges and Responses' in: Sharon Siddique and Sree Kumar (eds.), *The 2nd ASEAN Reader* (Institute of Southeast Asian Studies, Singapore 2003), p. 34 and Mathew Davies, 'Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights' (2013) 26 *The Pacific Review* 385, pp. 387-391.

⁵⁴ Mathew Davies, 'Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights' (2013) 26 *The Pacific Review* 385, p. 388.

⁵⁵ Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 111, hereby referring to Mathew Davies, 'Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights' (2013) 26 *The Pacific Review* 385, pp. 387-391.

⁵⁶ Mathew Davies, 'Explaining the Vientiane Action Programme: ASEAN and the Institutionalisation of Human Rights' (2013) 26 *The Pacific Review* 385, p. 389.

1. Completion of a stock-taking of existing human rights mechanisms and equivalent bodies, including sectoral bodies promoting the rights of women and children
2. Formulation and adoption of MOU to establish network among existing human rights mechanisms
3. Formulation of work programme of the network
4. Promote education and public awareness on human rights
5. Establish a network of cooperation among existing human rights mechanisms
6. Elaboration of an ASEAN instrument on the protection and promotion of the rights of migrant workers
7. Establishment of an ASEAN commission on the promotion and protection of the rights of women and children.⁵⁷

The VAP specifically dealt with children, women, elderly and persons with disabilities, as part of the Socio-Cultural Community in its programme area ‘Building an Community of Caring Societies’. It determined *inter alia* the following:

1. Implement programmes on child survival, development and protection consistent with the Convention on the Rights of the Child (CRC)
2. Implement the eight goals of the Declaration on the Elimination of Violence Against Women in the ASEAN Region
3. Strengthen regional collaboration in programmes to combat trafficking in women and children
4. Develop and implement the ASEAN Work Plan on Women’s Advancement Agenda in politics
5. Develop a standardised set of measurement tools for quantifying disability and the assessment of health and social care needs for older persons
6. Collect and exchange information on best practices in family and community-based care for the elderly and capacity building for professionals involved in elderly care
7. Develop and implement regional activities that assist Member Countries to strengthen capacity to facilitate access by all members of society, especially the vulnerable groups, to education, consistent with the UN Millennium Development Goals
8. Promoting equitable participation of women in the development process by eliminating all forms of discrimination against them⁵⁸

Pisanò observed that “the VAP gave a new ‘impetus’ to the definition of forms of human rights protection in ASEAN, particular for children, women, and migrant

⁵⁷ ASEAN, *Vientiane Action Programme*, 29 November 2004, Annex 1, Article 1.1.4 <<http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf>> last accessed 15 September 2018.

⁵⁸ ASEAN, *Vientiane Action Programme*, 29 November 2004, Annex 3, Article 3.1.3 <<http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf>> last accessed 15 September 2018.

workers”.⁵⁹ Salient is that human rights in general are perceived to be part of the Security-Pillar, while children, women, elderly and persons with disabilities are included in the Socio-Cultural Pillar. Davies aptly determined in this respect that issues on women, children – but also other vulnerable groups – are viewed “qualitatively differently from human rights generally, and as such are less threatening to politically conservative states”.⁶⁰ This is a viable explanation why ASEAN has taken up women, children and other vulnerable groups as common concern in earlier stages than human rights in general.

As described in the previous chapter, the development of the Pillars was initiated by the Declaration of ASEAN Concord II. One year later, during the Tenth ASEAN Summit, the ASEAN Security Community (ASC) Plan of Action and its Annex were adopted (Vientiane, 29-30 November 2004). This Plan stipulated that the goal of the ASC is to “ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment. The ASC would be based on shared norms and rules of good conduct in inter-state relations; effective conflict prevention and resolution mechanisms; and post-conflict peace building activities”.⁶¹ The document listed political development as one of its five areas of cooperation, for which the Annex specified concrete activities. The promotion of democracy, including the rule of law and good governance, and human rights were included in the political development policy. The Annex included the following:

Promotion of human rights and obligations:

- a. Establishing a network among existing human rights mechanisms;
- b. Protecting vulnerable groups including women, children, people with disabilities, and migrant workers; and
- c. Promoting education and public awareness on human rights.⁶²

The ASEAN Charter (2007)⁶³ and its implementation marks a new era, in which old and new principles are combined. Specifically, ASEAN values like “respect for independence, sovereignty, equality, territorial integrity and national identity” (Article 2(2)(a)) and the principle of “non-interference in the internal affairs of ASEAN member states” (Article 2(2)(e)) are stressed again, while respect for the

⁵⁹ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 397.

⁶⁰ Mathew Davies, ‘States of Compliance?: Global Human Rights Treaties and ASEAN Member States’ (2014) 13 *Journal of Human Rights* 414, p. 419.

⁶¹ ASEAN, *ASEAN Security Community Plan of Action*, Vientiane, 29 November 2004, Article 4 <https://asean.org/?static_post=asean-security-community-plan-of-action> last accessed 19 September 2018.

⁶² ASEAN, *Annex for ASEAN Security Community Plan of Action*, Vientiane, 29 November 2004, Article 1.2 <https://asean.org/?static_post=annex-for-asean-security-community-plan-of-action>, last accessed 19 September 2018.

⁶³ ASEAN, *Charter of the Association of Southeast Asian Nations*, Singapore, 20 November 2007 <<https://asean.org/asean/asean-charter/>> last accessed 19 September 2018.

“rule of law, good governance, democracy and constitutional government” (Article 2(2)(h)) and for “fundamental freedoms, the promotion and protection of human rights and the promotion of social justice” (Article 2(2)(i)) are also included.

Human rights as a topic of common concern was thus formalised in the 2007 ASEAN Charter. Djamin commented that the ASEAN Charter could be considered as a step forward in the discussion on the universality and particularity of human rights. He also noted that the ASEAN Charter includes principles of non-interference, sovereignty and respect for culture, but that this does not necessarily imply an acknowledgement of the particularity of human rights.⁶⁴

Human rights are mentioned in the preamble, the purposes, and principles of ASEAN. Article 14 ASEAN Charter includes the establishment of an ASEAN Human Rights Body (AHRB):

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

The Eminent Persons Group on the ASEAN Charter (EPG)⁶⁵ did not make proposals for creating a regional human rights mechanism during the drafting process, but generally stated that “this worthy idea should be pursued further, especially in clarifying how such a regional mechanism can contribute to ensuring the respect for and protection of human rights of every individual in every Member State”.⁶⁶ Yet, the High-Level Task Force for the Drafting of the ASEAN Charter (HLTF) that was part of the drafting process included Article 14 ASEAN Charter on an ASEAN Human Rights Body.

The ASEAN Foreign Ministers established a High-Level Panel (HLP) to draft the Terms of Reference of the ASEAN Human Rights Body. Based on the Terms of Reference for the High Level Panel on an ASEAN Human Rights Body, the HLP

⁶⁴ Interview with Rafendi Djamin, Regional Director for South East Asia and Pacific of Amnesty International and former Executive Director of the Human Rights Working Group as well as former Indonesian Representative for the ASEAN Intergovernmental Commission on Human Rights from 2009-2015 (Jakarta, 19 October 2009).

⁶⁵ The EPG was formed by ten ‘eminent persons’, one from each Member State. See for its mandate ASEAN, *Terms of Reference of the Eminent Persons Group (EPG) on the ASEAN Charter*, Kuala Lumpur, 12-13 December 2005 <https://asean.org/?static_post=terms-of-reference-of-the-eminent-persons-group-epg-on-the-asean-charter> last accessed 19 September 2018. The drafting process consisted out of their work and the work of the High Level Task Force for the Drafting of the ASEAN Charter (HLTF).

⁶⁶ Eminent Persons Group on the ASEAN Charter, *Report of the Eminent Persons Group on the ASEAN Charter* (December 2006) <<http://www.asean.org/wp-content/uploads/images/archive/19247.pdf>> last accessed 15 September 2018.

started its work.⁶⁷ During the 15th ASEAN Summit the inauguration of the ASEAN Intergovernmental Human Rights Commission took place,⁶⁸ together with the endorsement of its Terms of Reference (ToR).⁶⁹

Also relevant is the adoption of the Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III).⁷⁰ With respect to political development, the following is formulated:

Consistent with the purposes and principles of ASEAN basic instruments to ensure that peoples and Member States of ASEAN live in peace with the world at large in a just, democratic, and harmonious environment, ASEAN resolves at the global level to:

- a. Adhere to the rules of law, good governance, the principles of democracy, and constitutional government.
- b. Promote and protect human rights and fundamental freedoms, as well as promote social justice.⁷¹

With regard to socio-cultural cooperation, human rights topics were also addressed, such as access to adequate and affordable healthcare, medical services and effective medication, universal access to primary education and the protection of (migrant) workers.

The ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers⁷² was adopted in 2007. Muntarbhorn aptly noted that this is the first declaration with the word ‘rights’ in its title.⁷³ As well as elucidating general principles, the Declaration lays down both obligations for the receiving and the sending States to protect and promote the rights of migrant workers. For the receiving States, this task is crystallised explicitly in the protection of fundamental human rights and the promotion of the migrant’s workers welfare and human

⁶⁷ ASEAN, *Terms of Reference for the High Level Panel on an ASEAN Human Rights Body*, Singapore, 21 July 2008 <<http://www.asean.org/storage/images/archive/HLP-TOR.pdf>> last accessed 15 September 2018.

⁶⁸ ASEAN, *Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, Cha-am Hua Hin, 23 October 2009, available at <<http://hrlibrary.umn.edu/research/Philippines/Cha-Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf>> last accessed 19 September 2018.

⁶⁹ ASEAN, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, October 2009 <<http://aichr.org/documents/>> last accessed 19 September 2018.

⁷⁰ ASEAN, *Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III)*, Bali, 7 November 2011, <<http://www.asean.org/storage/archive/documents/19th%20summit/Bali%20Concord%20III.pdf>> last accessed 15 September 2018.

⁷¹ ASEAN, *Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III)*, Bali, 7 November 2011, Section A, Article 1(1) and 1(2) <<http://www.asean.org/storage/archive/documents/19th%20summit/Bali%20Concord%20III.pdf>> last accessed 15 September 2018.

⁷² ASEAN, *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, Cebu, 13 January 2007 <http://asean.org/?static_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers-3> last accessed 19 September 2018.

⁷³ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 120.

dignity. Fair wages, working and living conditions and exploitation of migrant workers are also addressed.⁷⁴

The ASEAN commitments for ASEAN as an organisation are also listed in this Declaration, whereby a number of them relate to human rights. An example is the effort to prevent or decrease trafficking of persons. Also relevant is the last article, which “task[s] the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN’s vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting”.⁷⁵

Subsequent to the adoption of the Declaration, the ASEAN Committee On the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was established, which is further discussed in Subsection 5.4 of this chapter.

The 2010 Hanoi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children⁷⁶ lists actions and measures that essentially combine previous commitments. Reference is made to the international level, including CEDAW and CRC to which all ASEAN Member States are party. Striking is that ASEAN Member States should support the sectoral bodies which are listed in the Declaration, by “appropriate instruments as may be necessary and consistent with their respective national laws and policies”.⁷⁷

The 2011 ASEAN Leaders’ Joint Statement on Enhancing Cooperation Against Trafficking in Persons in Southeast Asia⁷⁸ mainly stresses to further strengthen regional and international cooperation.

In the 2012 Vientiane Declaration on Enhancing Gender Perspective and ASEAN Women’s Partnership for Environmental Sustainability⁷⁹ the Member

⁷⁴ ASEAN, *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, Cebu, 13 January 2007, Articles 5, 8 and 9 <http://asean.org/?static_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers-3> last accessed 19 September 2018.

⁷⁵ ASEAN, *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, Cebu, 13 January 2007, Article 22 <http://asean.org/?static_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers-3> last accessed 19 September 2018.

⁷⁶ ASEAN, *Hanoi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children*, Hanoi, 28 October 2010 <https://asean.org/?static_post=ha-noi-declaration-on-the-enhancement-of-welfare-and-development-of-asean-women-and-children> last accessed 19 September 2018.

⁷⁷ ASEAN, *Hanoi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children*, Hanoi, 28 October 2010, last paragraph <https://asean.org/?static_post=ha-noi-declaration-on-the-enhancement-of-welfare-and-development-of-asean-women-and-children> last accessed 19 September 2018.

⁷⁸ ASEAN, *ASEAN Leaders’ Joint Statement on Enhancing Cooperation Against Trafficking in Persons in Southeast Asia*, Jakarta, 8 May 2011 <<http://asean.org/asean-leaders-joint-statement-in-enhancing-cooperation-against-trafficking-in-persons-in-south-east-asia-jakarta-8-may-2011/>> last accessed 19 September 2018.

States declared their commitment to promote nine goals. Reference is made to previous ASEAN commitments and international documents such as CEDAW. These goals concern the promotion of the knowledge and skills of women and their participation and protection in relation to environmental sustainability. The ASEAN Commission on Women and Children (further discussed in Subsection 5.3 of this chapter) bears the responsibility of its implementation and monitors the progress.

In the Phnom Penh Agenda for ASEAN Community Building⁸⁰ it was amongst others decided that within the ASEAN Political-Security Blueprint, the efforts regarding the conclusion of the ASEAN Human Rights Declaration should be intensified. Within the ASEAN Socio-Cultural Community, the ASEAN Labour Ministers were tasked to continue their work on the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. According to the document, this included “a phased approach in the development of an ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers in the region, starting by focusing on issues which are comfortable to all ASEAN Member States, in line with the existing national laws and/or policies, and in accordance with the Cebu Declaration”.⁸¹ Finally, the importance of women in regional development was recognised. The optimisation of ASEAN mechanisms on women’s issues was therefore called for. Specifically, they referred to the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children, the ASEAN Committee on Women and ASEAN Ministerial Meeting on Women, and other sectoral bodies related to women, to ensure effective implementation of their planned activities.⁸²

The Declaration on the Elimination of Violence Against Women and the Elimination of Violence Against Children in ASEAN (ACWC Declaration, 2013)⁸³ refers to previous human rights commitments within ASEAN and the international level and was adopted after the AHRD. While reference is made to the international level, it also takes various factors into consideration, including the regional and national contexts and the different historical, political, socio-cultural religious, legal

⁷⁹ ASEAN, *Vientiane Declaration on Enhancing Gender Perspective and ASEAN Women’s Partnership for Environmental Sustainability*, Vientiane, 19 October 2012 <https://asean.org/wp-content/uploads/images/2012/Social_cultural/ACW/Press_release/First%20draft%20of%20Vientiane_Declaration_of_AMMW_FINAL.pdf> last accessed 19 September 2018.

⁸⁰ ASEAN, *Phnom Penh Agenda for ASEAN Community Building*, Phnom Penh, 3 April 2012 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2012-Phnom-Penh-Agenda-for-ASEAN-Community-Building.pdf>> last accessed 15 September 2018.

⁸¹ ASEAN, *Phnom Penh Agenda for ASEAN Community Building*, Phnom Penh, 3 April 2012, Article 6 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2012-Phnom-Penh-Agenda-for-ASEAN-Community-Building.pdf>> last accessed 15 September 2018.

⁸² ASEAN, *Phnom Penh Agenda for ASEAN Community Building*, Phnom Penh, 3 April 2012, Article 8 <<https://cil.nus.edu.sg/wp-content/uploads/formidable/18/2012-Phnom-Penh-Agenda-for-ASEAN-Community-Building.pdf>> last accessed 15 September 2018.

⁸³ ASEAN, *Declaration on the Elimination of Violence Against Women and the Elimination of Violence Against Children in ASEAN*, 9 October 2013 <<http://aichr.org/documents/>> last accessed 19 September 2018.

and economic backgrounds in the region in its preamble. National legislation can be strengthened and, where necessary, enacted or amended (Article 1). Also, the ASEAN Commission on Women and Children has a role with respect to adhering to the international level, as Article 4 lays down the following:

Strengthen the existing national mechanisms, with the assistance, where necessary, of the ACWC and other related stakeholders, in implementing, monitoring and reporting the implementation of the Concluding Observations and Recommendations of CEDAW, CRC and other Treaty Bodies as well as the accepted recommendations under the Universal Periodic Review Process of the United Nations Human Rights Council related to the elimination of all forms of violence against women and violence against children.⁸⁴

The ASEAN Commission on Women and Children is, as a monitoring body, tasked with the promotion of the implementation and review process. This Commission held a joint meeting with the ASEAN Committee on Women to develop the ASEAN Regional Plan of Action on the Elimination of Violence against Women.

In the Nay Pyi Taw Declaration on the Realisation of the ASEAN Community by 2015⁸⁵ the importance of cooperation among the ASEAN Member States was stressed. Reference was also made to international law and human rights. Specifically, Articles 2 and 3 read as follows:

2. To further enhance ASEAN cooperation in promoting democracy, good governance and the rule of law, and promotion and protection of human rights and fundamental freedoms, with due regard to the rights and responsibilities of the ASEAN Member States, so as to further enhance a rule-based community of shared values and norms;
3. To promote and uphold the rule of law in the conduct of relations, including in the peaceful resolution of disputes in accordance with universally recognized principles of international law;

The ASEAN's human rights oriented documents discussed above, illustrate how the inclusion of human rights as a topic of common concern was included over the years. The Blueprints that were adopted for each ASEAN Community were excluded so far from this overview. The latest Blueprints succeed the first set of Blueprints. These Blueprints are jointly analysed in the remainder of this subsection.

⁸⁴ ASEAN, *Declaration on the Elimination of Violence Against Women and the Elimination of Violence Against Children in ASEAN*, 9 October 2013, Article 4 <<http://aichr.org/documents/>> last accessed 19 September 2018.

⁸⁵ ASEAN, *Nay Pyi Taw Declaration on the Realisation of the ASEAN Community by 2015*, 11 May 2014, Articles 2 and 3 <<http://asean.org/storage/2012/05/24th-NPT-Declaration.pdf>> last accessed 19 September 2018.

ASEAN's Blueprints

The first set of Blueprints forms together with the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Workplan 2 (2009-2015) the Roadmap for an ASEAN Community 2009-2015).⁸⁶ 'ASEAN 2025: Forging Ahead Together'⁸⁷ succeeds the Roadmap. This Roadmap consists of the ASEAN Community Vision 2025 and the three Blueprints. In particular, this Vision includes the determination "to consolidate our Community, building upon and deepening the integration process to realise a rules-based, people-oriented, people-centred ASEAN Community, where our peoples enjoy human rights and fundamental freedoms, higher quality of life and the benefits of community building, reinforcing our sense of togetherness and common identity, guided by the purposes and principles of the ASEAN Charter".⁸⁸

ASEAN has formulated a number of general ambitions for the coming years, next to its ambitions per Community. In light of the research, the following are especially relevant:

- Greater emphasis on the peoples of ASEAN and their well-being;
- Engage all nationals of ASEAN Member States through effective and innovative platforms to promote commitment and identification with ASEAN policies and regional interests;
- Ensure fundamental freedoms, human rights and better lives for all ASEAN peoples;
- Implement the ASEAN agenda while pursuing national aspirations, which contribute to ASEAN community-building.⁸⁹

The three Blueprints have the following elements in common. They are divided according to their focal points, which are subdivided in specific areas of cooperation. Concrete priority actions are articulated for each area of cooperation. Accountability for the overall implementation of each Blueprint lies with the ASEAN Political-Security Community Council, the ASEAN Socio-Cultural Community Council and the ASEAN Economic Ministers. The Secretary-General

⁸⁶ ASEAN, *Roadmap for the ASEAN Community (2009-2015)*, Cha-am, 1 March 2009 <http://www.asean.org/storage/images/ASEAN_RTK_2014/2_Roadmap_for_ASEAN_Community_20092015.pdf> last accessed 19 September 2018 adopted in ASEAN, *Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015)*, Cha-am, 1 March 2009. <http://www.asean.org/storage/images/ASEAN_RTK_2014/2_Roadmap_for_ASEAN_Community_20092015.pdf> last accessed 19 September 2018. This document replaces the Vientiane Action Programme.

⁸⁷ ASEAN, *Forging Ahead Together*, Kuala Lumpur, 22 November 2015 <<http://www.asean.org/storage/2015/12/ASEAN-2025-Forging-Ahead-Together-final.pdf>> last accessed 19 September 2018.

⁸⁸ ASEAN, *ASEAN Community Vision*, Kuala Lumpur, 22 November 2015, Article 4 <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

⁸⁹ ASEAN, 'ASEAN 2025 At a Glance' (24 November 2015) <<https://asean.org/asean-2025-at-a-glance/>> last accessed 19 September 2018.

is charged with the responsibility to report annually about the progress to the ASEAN Summit and to other relevant Ministerial Meetings and Councils. At the national level, activities of the Blueprints are included in the policies of the Member States, which have to report on the progress made.⁹⁰

This section shortly describes each Blueprint in general and then focuses on the inclusion of or orientation towards human rights and explores whether human rights could be read into some of the provisions while human rights are not referred to as such.

ASEAN Political-Security Community (APSC) Blueprints

Guided by the ASEAN Charter and its principles and purposes, the first APSC-Blueprint build on the ASEAN Security Plan of Action, the VAP and decisions by different ASEAN Sectoral bodies. In this way, the efforts taken in political security cooperation were continued within the then new structure of ASEAN. The Blueprint contributed to closer integration and cooperation among the Member States in developing shared norms and mechanisms to achieve the goals and objectives in their political and security cooperation. In the process, a people-oriented ASEAN was promoted. This means that “all sectors of society [...] are encouraged to participate in, and benefit from the process of ASEAN integration and community building.”⁹¹

Traditionally, ASEAN has subsumed human rights under the heading of political development and security. This line is continued by including human rights in the APSC. Under the focal point of ‘a rule-based community of shared values and norms’,⁹² the Blueprint highlighted the following:

ASEAN’s cooperation in political development aims to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN, so as to ultimately create a Rules-based Community of shared values and norms. In the shaping and sharing of norms, ASEAN aims to achieve a standard of common adherence to norms of good conduct among member states of the ASEAN Community; consolidating and strengthening ASEAN’s

⁹⁰ Regarding national involvement, only the APSC Blueprint explicitly mentions that APSC components should be included in the national development plans (ASEAN, *ASEAN Political-Security Blueprint*, Cha-am 1 March 2009, Article III(A)(28) <<http://asean.org/wp-content/uploads/archive/5187-18.pdf>> last accessed 15 September 2018), whereas the ASCC Blueprints lists specific actions for the Member States throughout the document; ASEAN, *ASEAN Socio-Cultural Community Blueprint*, Cha-am, 20 November 2007 <<http://asean.org/wp-content/uploads/archive/5187-19.pdf>> last accessed 15 September 2018.

⁹¹ ASEAN, *ASEAN Political-Security Community Blueprint*, Cha-am, 1 March 2009, Article II(7) <<http://asean.org/wp-content/uploads/archive/5187-18.pdf>> last visited 15 September 2018.

⁹² ASEAN, *ASEAN Political-Security Community Blueprint*, Cha-am, 1 March 2009, Subsection II.B. The other two focal points of the Blueprint are ‘a cohesive, peaceful and resilient region with shared responsibility for comprehensive security’ and ‘a dynamic and outward-looking region in an increasingly integrated and interdependent world’ (Subsections II.C and II.D) <<http://asean.org/wp-content/uploads/archive/5187-18.pdf>> last visited 15 September 2018.

solidarity, cohesiveness and harmony; and contributing to the building of a peaceful, democratic, tolerant, participatory and transparent community in Southeast Asia.⁹³

According to Vatikiotis, human rights are “a litmus test of ASEAN’s declared goal of creating a rules-based community of shared values and norms.” According to this author, “[t]he gains of community-building would be futile if ASEAN fails to provide fundamental safeguards and protection for its peoples.”⁹⁴

A notable element is the promotion and protection of human rights with due regard to the rights and responsibilities of the Member States, which is a reiteration of Article 1(7) ASEAN Charter. Human rights, democracy, good governance and the rule of law were included as areas of cooperation. This was the first step in further strengthening human rights within the improved ASEAN structure. Also included was the ambition to create a common standard of values and norms, which led to the adoption of the ASEAN Human Rights Declaration. In addition, as part of ASEAN’s political development the following seven specific actions were mentioned in Article A.1.5:

- i. Establish an ASEAN human rights body through the completion of its Terms of Reference (ToR) by 2009 and encourage cooperation between it and existing human rights mechanisms, as well as with other relevant international organizations;
- ii. Complete a stock-take of existing human rights mechanisms and equivalent bodies, including sectoral bodies promoting the rights of women and children by 2009;
- iii. Cooperate closely with efforts of the sectoral bodies in the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers;
- iv. Strengthen interaction between the network of existing human rights mechanisms as well as other civil society organisations, with relevant ASEAN sectoral bodies;
- v. Enhance/conduct exchange of information in the field of human rights among ASEAN countries in order to promote and protect human rights and fundamental freedoms of peoples in accordance with the ASEAN Charter and the Charter of the United Nations, and the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action;
- vi. Promote education and public awareness on human rights; and
- vii. Cooperate closely with efforts of the sectoral bodies in the establishment of an ASEAN commission on the promotion and protection of the rights of women and children.

Democracy was included as one of its areas of cooperation (Article A.1.8); democratisation should be pursued by promoting a people-oriented ASEAN (Article 1(13) ASEAN Charter). This meant that ASEAN, mainly through the Committee of

⁹³ ASEAN, *ASEAN Political-Security Community Blueprint*, Cha-am, 1 March 2009, Article II(A)(12) <<http://asean.org/wp-content/uploads/archive/5187-18.pdf>> last visited 15 September 2018.

⁹⁴ Michael Vatikiotis, ‘ASEAN Needs to Embrace Human Rights’ [2017] (5) *ASEAN Focus* 11, p. 11.

Permanent Representatives and the Secretary-General, engaged with the entities that are associated with ASEAN (Chapter 5 and Annex 2 ASEAN Charter). These entities include civil society organisations that are involved with human rights. Good governance was promoted by, amongst others, the sharing of experiences and best practices, undertaking a study in order to come to recommendations to ASEAN sectoral bodies and promote dialogue and partnership among governments and other relevant sectors to enhance “transparency, accountability, participatory and effective governance”. Regarding the rule of law, Article A.1.3 mentioned action points for the development of cooperation programmes on the rule of law, judicial systems and legal infrastructure, conducting comparative studies, the development of a university curriculum on legal systems of the Member States and enhance cooperation among ASEAN and other stakeholders.

The ASEAN Community Vision 2025 envisions the APSC as:

(...) a united, inclusive and resilient community. Our peoples shall live in a safe, harmonious and secure environment, embrace the values of tolerance and moderation as well as uphold ASEAN fundamental principles, shared values and norms. ASEAN shall remain cohesive, responsive and relevant in addressing challenges to regional peace and security as well as play a central role in shaping the evolving regional architecture, while deepening our engagement with external parties and contributing collectively to global peace, security and stability.⁹⁵

To this end, ASEAN formulated the key aspirations of the ASEAN Political-Security Community as follows:

- A rules-based, people-oriented, people-centred ASEAN in a region of peace, stability and prosperity;
- A consolidated ASEAN Community;
- A dynamic, resilient and harmonious community able to effectively respond to social and economic vulnerabilities and other non-traditional security threats;
- A Community that can respond effectively to challenges affecting ASEAN from within and beyond the region;
- A Community that steadfastly maintains ASEAN centrality in regional mechanisms;
- Strengthened ASEAN unity and cohesiveness to protect its leading and central role in dealing with matters of common concern; and
- Enhanced dialogue and cooperation with ASEAN external partners for mutual benefit and interest.⁹⁶

⁹⁵ ASEAN, *ASEAN Community Vision 2015*, Kuala Lumpur, 22 November 2015, Article 7 <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

⁹⁶ ASEAN, ‘ASEAN 2025 At a Glance’ (24 November 2015) <<https://asean.org/asean-2025-at-a-glance/>> last accessed 19 September 2018.

With respect to human rights, the following was formulated:

A rules-based, people-oriented, people-centred community bound by fundamental principles, shared values and norms, in which our peoples enjoy human rights, fundamental freedoms and social justice, embrace the values of tolerance and moderation, and share a strong sense of togetherness, common identity and destiny.⁹⁷

To this end, ASEAN has adopted three key elements: (1) Adhere to and promote ASEAN fundamental principles, shared values and norms, as well as principles of international law governing the peaceful conduct of relations; (2) Strengthen democracy, good governance, the rule of law, promotion and protection of human rights and fundamental freedoms as well as combat corruption; and (3) Embed the culture of peace, including the values of tolerance and moderation as a force for harmony, peace and stability in our region and beyond.

While respect for the principles of independence, sovereignty, equality, territorial integrity, non-interference, and national identity (Article A.1.4) and strengthening respect for and recognition of the purposes and principles of the TAC (Article A.1.7) refer to the ASEAN Way, ASEAN also aims to strengthen democracy, good governance, the rule of law, the promotion and protection of human rights and fundamental freedoms, as well as to combat corruption (Section A.2). More specifically, Article A.2.5 deals with the promotion and protection of human rights, fundamental freedoms and social justice to ensure that ASEAN peoples live in dignity, peace, harmony and prosperity. Reference is made to strengthening domestic legislation and institutions, the regional level in terms of the AICHR and the AHRD, as well as ratifying or acceding to core international human rights instruments and ensuring their effective implementation.

The second focal point is a peaceful, secure and stable region, which also includes enhanced cooperation against trafficking in persons and people smuggling (see Article B.3.4 of the Blueprint). Other focal points are ASEAN centrality in a dynamic and outward-looking region and a strengthened ASEAN institutional capacity and presence.

ASEAN Economic Community (AEC) Blueprints

The ASEAN Economic Community Blueprint⁹⁸ is the most elaborate of the three Blueprints. Although strengthening human rights and fundamental freedoms is included as a general principle in the ASEAN Charter,⁹⁹ making cooperation in the field of human rights important to the ASEAN Community as a whole, no reference was made to human rights in the first AEC Blueprint. Nevertheless, there was a

⁹⁷ ASEAN, *ASEAN Political-Security Community Blueprint 2025*, Kuala Lumpur, 22 November 2015, Article II(5)(5.1) <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

⁹⁸ ASEAN, *ASEAN Economic Community Blueprint*, Singapore, 20 November 2007 <<http://asean.org/wp-content/uploads/archive/5187-10.pdf>> last accessed 15 September 2018.

⁹⁹ Article 7 ASEAN Charter.

limited number of possibilities for reading human rights into this Blueprint. Specifically, the single market and production base (Section II.A of the Blueprint), entail ASEAN's five freedoms, that is to say, free flow of goods, free flow of services, free flow of investment, freer flow of capital and free flow of skilled labour (Section II.A5). The last mentioned is relevant, albeit limited, for the rights of individuals. The Blueprint allowed visas and employment passes for professionals and skilled labour and cooperation within the ASEAN University Network (AUN).

Striking was ASEAN's focus on "natural persons engaged in the trade in goods, services, and investments",¹⁰⁰ thus restricting the freedom of labour to a defined group of persons. ASEAN's major work force, the semi-skilled and unskilled workers, were thus left outside the scope. Nevertheless, the right to work was at least established for a selected group, which is a starting point. Furthermore, Muntarbhorn observed that "[p]erhaps the nearest the economic blueprint comes to interrelating with human rights is on the issue of consumer protection".¹⁰¹

The current ASEAN Community Vision 2025 envisions an economic-community that "shall be highly integrated and cohesive; competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centred community, integrated with the global economy".¹⁰² This vision includes the ambition for "a more equitable and inclusive economic growth in ASEAN that narrows the development gap, [and which] eliminates if not reduces poverty significantly".¹⁰³

The principles of good governance, transparency, and responsive regulatory regimes are promoted (Article 6(iv) AEC Blueprint 2025). Skilled labour is again included (Section A.5 AEC Blueprint 2025), and also healthcare is also one of the topics of common concern (Section C.7 AEC Blueprint 2025). The stress on a resilient, inclusive, people-oriented and people-centred ASEAN is also part of the AEC Blueprint 2025, which amongst others focuses on narrowing the development gap.

ASEAN Socio-Cultural Community (ASCC) Blueprints

The first ASEAN Socio-Cultural Community Blueprint described the Community's main goal as to contribute to a people-centred and socially responsible ASEAN

¹⁰⁰ ASEAN, *ASEAN Economic Community Blueprint*, Singapore, 20 November 2007, Section II, Subsection A, Article 33. Section II, Article 6 underscores the focus of the AEC on the movement of business persons, skilled labour and talents <<http://asean.org/wp-content/uploads/archive/5187-10.pdf>> last accessed 15 September 2018.

¹⁰¹ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 115.

¹⁰² ASEAN, *ASEAN Community Vision 2025*, Kuala Lumpur, 22 November 2015, Article 9 <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

¹⁰³ ASEAN, *ASEAN Economic Community Blueprint 2025*, Kuala Lumpur, 22 November 2015, Article 6(ii) <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

Community. Moreover, “enduring solidarity and unity” was pursued by “forging a common identity and building a caring and sharing society which is inclusive and harmonious where the well-being, livelihood, and welfare of the peoples is enhanced.”¹⁰⁴ Human rights were explicitly mentioned in this Blueprint:

The ASCC is characterised by a culture of regional resilience, adherence to agreed principles, spirit of cooperation, collective responsibility, to promote human and social development, respect for fundamental freedoms, gender equality, the promotion and protection of human rights and the promotion of social justice.¹⁰⁵

The ASCC aimed at increasing the quality of life of the ASEAN people through the following six areas of cooperation: human development, social welfare and protection, social justice and rights, ensuring environmental sustainability, building the ASEAN identity, and narrowing the development gap. A number of these focus points are related to human rights.

In the area of human development, the most notable elements of the first Blueprint were the ambition to achieve universal primary education and the focus on gender equality in the access to education (Section A.1), decent work (Section A.3), and the attention on women, youth, elderly, disabled people, and the work force in particular (throughout the document, but mainly Section A.6). The focus on these groups were a continuation of the focus of the human rights (oriented) documents that are discussed above. Vulnerable and marginalised groups were also included as a group for which participation in the productive workforce should be increased, although concrete actions were not included.

Human rights were explicitly addressed in the ambition to undertake initiatives to implement the ASEAN Conference on Civil Service Matters Workplan (2008-2012) as a means to promote, *inter alia*, transparency, respect for human rights and gender equality, and the ambition to provide special attention to the poor and needy by ASEAN public servants who should advocate the goals of the ASCC.

The area on social welfare and protection included, amongst others, and with reference to the Millennium Development Goals on extreme poverty and health, the management of socio-economic disparities and poverty (Section II.B.1), social protection (Section II.B.2), adequate access to food (Section II.B.3), adequate and affordable healthcare and medical services (Section II.B.4).

The domain of social justice and people’s rights is especially relevant as it dealt with disadvantaged, vulnerable and marginalised groups. In line with previous documents, ASEAN thereby focused on women, children, the elderly, persons with disabilities (Section II.C.1) and migrant workers (Section II.C.2). The ambition to establish an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and to make the ASEAN Committee on the Implementation

¹⁰⁴ ASEAN, *ASEAN Socio-Cultural Community Blueprint*, Cha-Am, 1 March 2009, Section II, Articles 4 and 5 <<http://asean.org/wp-content/uploads/archive/5187-19.pdf>> last accessed 15 September 2018.

¹⁰⁵ ASEAN, *ASEAN Socio-Cultural Community Blueprint*, Cha-Am, 1 March 2009, Section II, Article 6 <<http://asean.org/wp-content/uploads/archive/5187-19.pdf>> last accessed 15 September 2018.

of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers operational, were formulated as action points (see Article II.C.1.27.i and II.C.2.28.i). Specific reference was made to the Work Plan to Operationalise the Declaration on the Elimination of Violence Against women in the ASEAN Region, and the UN Convention on the Rights of the Child (Article II.C.1.27, action point ii and iii).

The ASEAN Commission on Women and Children and the ASEAN Committee on Migrant Workers fall within the scope of the ASEAN Socio-Cultural Community Pillar, while the ASEAN Intergovernmental Commission on Human Rights is mentioned in the ASEAN Charter as one of the organisation's organs. The ASEAN Intergovernmental Commission on Human Rights is the overarching human rights commission according to its Terms of Reference and Guidelines of Operations, whereas the ASEAN Commission on Women and Children and the ASEAN Committee on Migrant Workers are not mentioned. They have to give account to different organs: the ASEAN Intergovernmental Commission on Human Rights is accountable to the ASEAN Foreign Ministers Meeting (Articles 14 and 20 ASEAN Charter), whereas the other two are accountable to the Senior Labour Ministers Meeting (Article II.C.2.28.i ASCC Blueprint).

ASEAN's ambition to be a people-oriented organisation in which all sectors of society can participate was also included in this Blueprint. Specifically, the engagement of NGOs in ASEAN Community building was included by conveying an annual ASEAN Social Forum and ASEAN Civil Society Conference at which issues such as effective dialogue, consultation and cooperation between ASEAN and the relevant actors are discussed (Section E.4). Accountability for the implementation of the Blueprint lay with the ASEAN Socio-Cultural Community Council (Section III.A.1). In addition, ASEAN Ministerial Bodies (or their equivalent) were also responsible for an effective implementation of the Blueprint by including the action points in their work plans, mobilising resources and undertaking national commitments (Section IIIA.2). Engagement with relevant actors was hereby included. The ASEAN Secretariat was made responsible for monitoring and reviewing the implementation of the Blueprint, for which it would develop indicators and systems for its assessment (Section III.D).

The current ASCC Blueprint envisions a community which shall be "one that engages and benefits the peoples, and is inclusive, sustainable, resilient, and dynamic" by the year 2025.¹⁰⁶ ASEAN formulated the key aspirations as follows:

- An inclusive Community that is people-oriented, people-centred and promotes a high quality of life and equitable access to opportunities for all, and engages relevant stakeholders in ASEAN processes;

¹⁰⁶ ASEAN, *ASEAN Community Vision 2025*, Kuala Lumpur, 22 November 2015, Article 11 <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

- A sustainable Community that promotes social development and environmental protection through effective mechanisms to meet current and future needs of the peoples;
- A resilient Community with enhanced capacity to continuously respond and adapt to current challenges and emerging threats; and
- A dynamic, open, creative and adaptive Community with an ASEAN identity reflecting the region's collective personality, norms, values and beliefs as well as aspirations as one ASEAN Community.¹⁰⁷

For each element strategic measures were adopted. The move towards becoming a more inclusive community (part B of the Blueprint) is especially relevant as it focuses on women, children, youth, the elderly/older persons, persons with disabilities, migrant workers, ethnic minority groups, and vulnerable and marginalised groups and refers to the ACWC which is a continuation of the previous Blueprint. Furthermore, human rights are explicitly mentioned:

An inclusive community that promotes high quality of life, equitable access to opportunities for all and promotes and protects human rights of women, children, youth, the elderly/older persons, persons with disabilities, migrant workers, and vulnerable and marginalised groups.¹⁰⁸

3.3 Developing an ASEAN human rights system

ASEAN refers since the 1990s to the international level of the United Nations in its human rights instruments. Specifically, the UN Charter, the UDHR, the Vienna Declaration and programme of Action, as well as specific human rights documents such as CEDAW and CRC were explicitly addressed. ASEAN's reference to this international level started at the same time the Asian values debate reached its peak. This confirms the observation that the Asian values debate was more a political rhetoric of a small number of ASEAN Member States, while the general tendency was to refer to the international level. From this follows that the universality was in essence not questioned, while at the same time the ASEAN Member States underscored the room for particularities. What these particularities were, was not concretised. ASEAN for instance included that the general consideration of religious, cultural and social values have to be taken into consideration in its Declaration on the Commitments for Children in ASEAN in 2001 without specifying what these values were. Section 2 of Chapter IV showed that similar reservations that were issued by a number of ASEAN Member States to

¹⁰⁷ ASEAN, 'ASEAN 2025 At a Glance' (24 November 2015) <<https://asean.org/asean-2025-at-a-glance/>> last accessed 19 September 2018.

¹⁰⁸ ASEAN, *ASEAN Community Vision 2025*, Kuala Lumpur, 22 November 2015, Article 12(12.2) <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018 and ASEAN, *ASEAN Socio-Cultural Community Blueprint 2025*, Article 5(5.2) <<http://www.asean.org/storage/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>> last accessed 15 September 2018.

Conventions to which they are party, were not accepted by other States Parties and were considered to be contrary to norms of international law.

Furthermore, certain dominant values of the ASEAN Way were at some occasions pushed towards the background. For instance, while the notions of State sovereignty and non-interference in the internal affairs of a State are stressed throughout ASEAN's instruments, the Declaration on the Elimination of Violence Against Women in the ASEAN Region explicitly instructed the ASEAN Member States to enact, reinforce and amend their national legislation on violence against women, which should also include investigation to, and prosecution, sentencing and rehabilitation of perpetrators.

ASEAN stated that human rights are relevant to ASEAN as a whole. The inclusion of human rights in at least two of its pillars partly endorses this vision. This being said, ASEAN seems to consider the rights of vulnerable groups differently from human rights in general as the latter is included in the APSC, and vulnerable groups in the ASCC. Davies rightly observed in this respect that issues on vulnerable groups are viewed differently. As said, this could explain why ASEAN took up women, children and other vulnerable groups as common concern in earlier stages of its human rights engagement, than human rights in general.

As stated, human rights are nowadays included in the ASEAN Charter, which is considered to be ASEAN's constitution. This led to the establishment of the AICHR, ASEAN's overarching human rights body, and the adoption of the 2012 ASEAN Human Rights Declaration. Initiatives on topics which were already familiar to ASEAN continued, as the Statement on Enhancing Cooperation on Trafficking of Persons and the Declaration on the Elimination of Violence against Women and Children show.

From the Roadmaps follows that ASEAN's communities, at least on paper, further developed, although there is poor cross sectoral interaction.

4. THE ASEAN HUMAN RIGHTS DECLARATION

4.1 Drafting procedure

The ASEAN Human Rights Declaration (AHRD) was adopted with the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration at the 21st ASEAN Summit (18 November 2012),¹⁰⁹ and was formally launched on 23

¹⁰⁹ ASEAN, 'Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration', Phnom Penh, 18 November 2012 <<https://asean.org/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd/>> last accessed 19 September 2018. Striking is that Termsak Chalermpananupap noted in during an interview with the author in 2009 that a human rights declaration for ASEAN was not yet feasible; Interview with Termsak Chalermpananupap, the then ASEAN Director of the Political and Security Directorate (Jakarta, 14 October 2009). Djamin commented on 19 October 2009 that a study on a human rights declaration would be started in the first five years, but that it would mainly focus on the development of the institution itself and development of more independence and protection mandate; Interview with Rafendi Djamin, Regional Director for South

August 2013. This Declaration is considered “a roadmap for the regional human rights development”.¹¹⁰ While previous documents focused on human rights cooperation in general or on specific subjects such as women, children and migrant workers, this document marks the first time that ASEAN includes a comprehensive set of rights in a regional declaration. In addition, it has been considered as a forerunner to a formal treaty for the region.¹¹¹

The AHRD is developed by the AICHR (Article 4.2 ToR AICHR) and its *ad hoc* Drafting Group. The Terms of Reference for the Drafting Group was not made public.¹¹² This Drafting Group was tasked to develop a basic draft of the Declaration, which formed the basis for the deliberations and negotiations among the Commissioners. This Drafting Group started their work in July 2011 and prepared the basic draft that was submitted to the AICHR for deliberation. From January 2012, the AICHR convened meetings on an ASEAN Human Rights Declaration. The Commissioners finalised the Progress Report on the AHRD to the ASEAN Foreign Ministers to be submitted to the ASEAN Ministers Meeting Retreat in January 2012, which led to the adoption of the AHRD in November 2012.¹¹³

The drafting process of the document lacked transparency. This was due to the fact that civil society was mainly excluded from the drafting process, the UN High Commissioner for Human Rights commented that “[t]his is not the hallmark of the democratic global governance to which ASEAN aspires, and it will only serve to undermine the respect and ownership that such an important declaration deserves”.¹¹⁴

East Asia and Pacific of Amnesty International and former Executive Director of the Human Rights Working Group as well as former Indonesian Representative for the ASEAN Intergovernmental Commission on Human Rights from 2009-2015 (Jakarta, 19 October 2009). In this sense, it is striking that the AHRD was already adopted in 2012.

¹¹⁰ Underscored by then ASEAN Secretary-General Surin Pitsuwan, see ASEAN/AICHR, 'Press Release of the Fifth ASEAN Intergovernmental Commission on Human Rights', Jakarta, 25-29 April 2011 <<http://aichr.org/press-release/press-release-of-the-fifth-asean-intergovernmental-commission-on-human-rights-asean-secretariat/>> last accessed 19 September 2018.

¹¹¹ Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration' (2013) 13 *Human Rights Law Review* 557, p. 558, whereby parallels are drawn with the American Declaration of the Rights and Duties of Man, which preceded the American Convention on Human Rights, and the Universal Declaration of Human Rights (UDHR) which preceded the ICCPR and ICESCR.

¹¹² Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration' (2013) 13 *Human Rights Law Review* 557, p. 558.

¹¹³ ASEAN, *Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration*, Phnom Penh, 18 November 2012 <<https://asean.org/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd/>> last accessed 19 September 2018.

¹¹⁴ The Office of the High Commissioner for Human Rights (UN Human Rights), 'UN rights chief welcomes focus on human rights and democracy, calls for review of ASEAN draft human rights declaration' (Bali, 8 November 2012) <<https://reliefweb.int/report/world/un-rights-chief-welcomes-focus-human-rights-and-democracy-calls-review-asean-draft>> last accessed 19 September 2018.

4.2 Human rights as included in the AHRD

4.2.1 *The AHRD as a compromise between the ASEAN Member States*

The Commissioners of the AICHR pronounced their hope that the ASEAN Human Rights Declaration would “reflect the aspirations of the peoples of ASEAN, and be presented as ASEAN’s unique contribution to the international human rights discourse”.¹¹⁵ In connection to the diversity in legal systems among the ASEAN Member States, Marty Natalegawa, then in his capacity as Indonesia’s Minister of Foreign Affairs, commented on the AHRD that a “perfect document” cannot be reached due to the diverse systems and interests in the ASEAN Member States.¹¹⁶ This makes that the AHRD is the result of a compromise, both between the Member States and their position on human rights, and between the standards set at international and national level.

The final version of the AHRD includes forty articles divided under the headings of general principles, civil and political rights, economic, social and cultural rights, the right to development, the right to peace, and cooperation in the promotion and protection of human rights.

The draft versions of 8 January 2012 and 23 June 2012 were leaked and are included in this study. When comparing the final version of the AHRD with the January and June drafts, topics on which the Member States had to compromise, are noticeable. First of all, the January draft included a chapter on the rights of women, children and other vulnerable groups,¹¹⁷ but was omitted in the June version. Although the first draft mentioned the death penalty in relation to the right to life, the final document does not say anything about the death penalty. In the final version the prohibition of enforced disappearances is also not mentioned with respect to personal liberty and security. The prohibition of forced labour was initially mentioned but was not included in the final version. The right to practice one’s religion or belief was changed into the phrase that “all forms of intolerance, discrimination and incitement of hatred on religion and beliefs shall be eliminated”.¹¹⁸ This does not include the right to change one’s religion and to manifest religion in teaching, practice, worship and observance. It is likely that this

¹¹⁵ ASEAN/AICHR, ‘Press Release of the First Meeting of ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration’ (Siem Reap, 8-9 January 2012) <http://asean.org/?static_post=press-release-of-the-first-meeting-of-asean-intergovernmental-commission-on-human-rights-on-the-asean-human-rights-declaration-siem-reap-cambodia-8-9-january-2012> last accessed 19 September 2018.

¹¹⁶ Bagus B.T. Saragih, ‘AHRD won’t be perfect, says Marty’ *The Jakarta Post* (Jakarta, 20 September 2012) <<http://www.thejakartapost.com/news/2012/09/20/ahrd-won-t-be-perfect-says-marty.html>> last accessed 19 September 2018.

¹¹⁷ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, chapter VII (Articles 80-90), on file with the author.

¹¹⁸ Article 22 AHRD, see for the Declaration, ASEAN, *ASEAN Human Rights Declaration*, Phnom Penh, 18 November 2012 <http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf> last accessed 19 September 2018.

omission is influenced by positions of certain (Islamic) ASEAN Member States towards the freedom of religion and the issue whether this right contains the right to apostasy. In addition, while the January draft mentioned the principle of *non-refoulement* within ambit of the law,¹¹⁹ this is not included in the final version of Article 16 AHRD. Concerning the right to marry, found a family or dissolve a marriage, these rights are subjected to national law while that was not the case in the January draft. This has implications for, for example, the legality of child marriages.¹²⁰ The right to pursue one's own economic, and social development and to choose one's own political system are not incorporated in the final document. The right to a fiscally responsive government/system is neither included in the final version. The right to development was also more elaborate in the January draft.

Salient is that the January draft mentioned that "[e]veryone whose human rights have been violated has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities" (Article 6), which was proposed by Thailand, Indonesia and the Philippines. These three States also suggested to include that "[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national, regional and international levels without any arbitrary sanction or interference" (Article 4). While the former proposal is included in the AHRD, the latter was not adopted. Instead, the final version mentions that ASEAN Member States share a common interest in and commitment to the promotion and protection of human rights and fundamental freedoms which shall be achieved through, *inter alia*, cooperation with one another as well as with relevant national, regional and international institutions or organisations, in accordance with the ASEAN Charter (Article 39 AHRD). While the AICHR was responsible for drafting the AHRD and is considered as ASEAN's overarching human rights body, it is striking that the AICHR is neither explicitly included in Article 39 AHRD, nor anywhere else in the document.

With respect to the following topics, the final version is more elaborate than the draft versions. The limitations on the freedom of the media and expression were omitted in the final version. The rights of a person in criminal proceedings includes also the right that one cannot suffer greater punishment than at the time of crime was committed, while the draft did not mention this principle. The final version also

¹¹⁹ Reference to national law was proposed by Malaysia, see ASEAN Human Rights Declaration, working draft as of 8 January 2012, footnote 33.

¹²⁰ Child marriage occurs in a number of Member States, and it topic of debate. See for example on Malaysia: Reuters, 'Malaysian outraged over Reports of Child Marriage' *The Jakarta Post* (Kuala Lumpur, 1 July 2018) <<http://www.thejakartapost.com/seasia/2018/07/01/malaysians-outraged-over-reports-of-child-marriage.html>> last accessed 19 September 2018 and The Star/ANN, 'Child Marriages not prohibited in Amended Act' *The Jakarta Post* (Petaling Jaya, 19 April 2016), <<http://www.thejakartapost.com/seasia/2016/04/19/child-marriages-not-prohibited-in-amended-act.html>> last accessed 19 September 2018. On Indonesia, see for example Liza Yosephine, 'Why does Marrying Young cause more Harm than Good?' *The Jakarta Post* (Jakarta, 22 August 2016) <<http://www.thejakartapost.com/news/2016/08/22/why-does-marrying-young-cause-more-harm-than-good.html>> last accessed 19 September 2018.

mentions technical, vocational and higher education, whereas the draft did not. Finally, the right to freely dispose of and control wealth and natural resources, the right to peace, harmony and stability in the region, dignity, the freedom to live free from poverty and hunger are added to the final version, while the duties of the State are addressed in more detail. The right to own, use, dispose and give lawfully acquired possessions was not included in the January draft under economic rights, but was moved in the final version to Article 17 under the heading of civil and political rights.

Compared to the constitutions of the ASEAN Member States, the AHRD moves generally beyond the fundamental rights that are included at the national level. Davies observed in this respect that the set of civil and political rights is “far beyond those recognised in many of the states that negotiated the Declaration”.¹²¹ This author hereby highlighted Articles 21, 22 and 25(1) AHRD on the freedom of thought, expression and the rights to participate in the government of one’s country in relation to the more authoritarian and conservative ASEAN Member States.¹²² Moreover, the rights included in the AHRD, except for the right to vote, are not restricted to ASEAN citizens, whereas the constitutions of the ASEAN Member States often apply only to citizens. Echoed is the importance of the family and fundamental unit of society (Article 19) and the special attention to children and youth (Articles 27(3) and 30(3)), as well as mothers (Article 30(3)).

Considering the limited common ground in the ratification of the core UN conventions (see Chapter III, Section 2 of this study), ASEAN has chosen to mainly refer to the UDHR, as it is “the common standard of achievement for all peoples and all nations”.¹²³ It is observed that this reference mirrors ASEAN’s ambition to endorse the universality of human rights. Chien-Huei Wu observed in this respect that “[t]he adoption of the AHRD can be seen as a step forward from regionalism to universalism, though how far this step goes should be carefully measured.”¹²⁴ Cooperation at the national, regional and international level in accordance with the ASEAN Charter is also underscored (Article 39 AHRD), while Article 40 AHRD refers to the international human rights instruments to which the ASEAN Member States are parties.

¹²¹ Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 113.

¹²² Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 113.

¹²³ UN General Assembly Resolution 217 (III) (*Universal Declaration of Human Rights*), UN Doc. A/Res/217, 10 December 1948, preamble.

¹²⁴ Chien-Huei Wu, ‘Human Rights in ASEAN Context: Between Universalism and Relativism’ in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 8. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

Furthermore, the wording in the AHRD demonstrates commonalities with the UDHR. The AHRD's general principles, civil and political rights and the economic social and cultural rights largely correspond to the articles guaranteed in the UDHR, often even literally. It is also stated in the AHRD that all the civil and political rights and economic, social and cultural of the UDHR are affirmed by the Member States (Articles 10 and 26 AHRD). Pisanò noted in this regard that the civil and political rights in Articles 11-25 "are all consistent with the spirit and the letter of the UDHR"¹²⁵ and that the economic, social and cultural rights are almost entirely corresponding to the UDHR.

Nevertheless, the previous subsections show that relativistic attitudes amongst the ASEAN Member States which are detrimental to the universality of human rights are still present in the ASEAN region. In this respect, the United States Department of States, for instance, voiced its concerns that the AHRD might "weaken and erode universal human rights and fundamental freedoms as contained in the UDHR".¹²⁶ From the perspective of civil society, the document was criticised for being inadequate and maybe even regressive.¹²⁷

Regarding the scope of the human rights in the AHRD, certain human rights are subjected to national laws. Reference to national laws is included in the right to life, the right to seek asylum, the right to a nationality, the right to marry, found a family or divorce, the right to be elected and to vote, the right to form and join trade unions. The age limit of child labour and the period of special protection to mothers is also left to the discretion of the Member States.

Furthermore, the right to found a family (Article 19 AHRD) lacks the prohibition of discrimination as included in Article 16 UDHR. Article 24 contains the right to peaceful assembly, but not the freedom of association. The Declaration does not include equal pay for equal work and the right to a just and favourable remuneration and does not mention equality in and a just and favourable remuneration for work (Article 23(2) and 23(3) UDHR) and Article 24 UDHR on the right to rest and leisure. Article 28 UDHR on the right to a social and international order in which the rights of the Declaration can be fully realised is also

¹²⁵ Attilio Pisanò, 'Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration' (2014) 15 *Human Rights Review* 391, p. 405.

¹²⁶ Open letter from the Coordination Committee, as referred to by Chien-Huei Wu, 'Human Rights in ASEAN Context: Between Universalism and Relativism' in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 9. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018). Referring to a press statement of Victoria Nuland, Department Spokesperson, Office of the Spokesperson Washington, DC, available at <<https://2009-2017.state.gov/r/pa/prs/ps/2012/11/200915.htm>> last accessed 19 September 2018.

¹²⁷ Human Right Watch, 'Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration' (19 November 2012) < <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>> last accessed 19 September 2018, referred to Mathew Davies, 'An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia' (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 108.

not mentioned in the AHRD. Social security is also not included when stipulating the right to an adequate living standard (Article 28 AHRD).

Article 33 AHRD tasks the ASEAN Member States to take steps to achieve “progressively the full realisation of economic, social and cultural rights recognised in this Declaration”. It departs from the ICESCR in the sense that the ASEAN Member States may decide to what extent they guarantee the economic and social rights to non-nationals (Article 34 AHRD), while the ICESCR only allows this for developing countries when guaranteeing economic rights (Article 2(3) ICESCR). This, according to Pisanò, “creates a weak point, having a direct impact on the universality, indivisibility, interdependence, and correlativity of human rights”.¹²⁸

The AHRD also expands and clarifies the UDHR in some cases, which can partly be explained by the fact that the UDHR dates from 1948 and because international law underwent further development. Article 13 AHRD includes the prohibition of “smuggling or trafficking in persons, including for the purpose of trafficking in human organs”, a phenomenon widespread in Southeast Asia,¹²⁹ when formulating the prohibition on servitude and slavery.¹³⁰ Article 19 AHRD changes the order compared to the UDHR in the sense that this article opens with a mention of the family “as the natural and fundamental unit of society [that] is entitled to protection by society and each ASEAN Member State”, whereas this is mentioned last in Article 16 UDHR. Pisanò noted that ““inversion” of addenda reflexes a more “institutional,” communitarian conception of the relationship between individuals and family, closer to African and Asian communitarian cultural traditions”.¹³¹

In line with ASEAN’s overall focus on vulnerable groups, the AHRD mentions that the rights of specific vulnerable groups (“women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups”) are inalienable, integral and indivisible part of human rights and fundamental freedoms (Article 4 AHRD). Also added is the principle of *ne bis in idem* (Article 20(3) AHRD). The AHRD also includes the prohibition of economic and social exploitation of children and young persons (Article 27(3) AHRD) and non-discrimination of people suffering from communicable diseases (e.g. HIV/AIDS, Article 29(2) AHRD). Motherhood is also paid more attention (Article 30) than in the UDHR (Article 25). Two rights are added to the list, namely, the right to development (Articles 35-37 AHRD) and the right to peace (Article 38 AHRD).

The right to a safe, clean and sustainable environment, the right to development and the right to peace are included as part of the third generation of human rights, which are described by Wu as “ASEAN characteristics, even though the AHRD is

¹²⁸ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 408.

¹²⁹ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 405.

¹³⁰ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ (2013) 13 *Human Rights Law Review* 557, p. 560.

¹³¹ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 405.

not the first instrument to speak of these [solidarity] rights”.¹³² Pisanò rightfully observed that the 1993 Bangkok Declaration already included in paragraph 17 the “the right to development [...] as a universal and inalienable right and an integral part of fundamental human rights”, which led to the inclusion of the right to development in paragraphs 10 and 11 of the Vienna Declaration.¹³³ In addition, Article 35 AHRD states that “development may not be invoked to justify the violations of human rights internationally recognized.” The right to peace (Article 38 AHRD) is placed within an “ASEAN framework of security and stability, neutrality and freedom”.

This analysis confirms that the AHRD is a compromise between the Member States and the international and national legal level. The following sections analyse the AHRD in light of the international human rights framework by focussing on the following issues: the universality of human rights and the call for particularities (Subsection 4.2.2), duties and responsibilities (Subsection 4.2.3) and limitations of rights (Subsection 4.2.4).

4.2.2 The universality of human rights and ASEAN’s call for particularities

In the preamble of the AHRD, commitment to the UDHR, the UN Charter, the VDPA and other international human rights instruments to which the Member States are parties, is reaffirmed. According to its State Parties, the Declaration will help to establish a framework for human rights cooperation in the region and the ASEAN community building process. At the same time, and characteristically for ASEAN, the AHRD also refers to national and regional particularities.

The January draft of the AHRD referred to the universality of human rights and national and regional particularities in its preamble:

- v. UPHOLDING the Charter of the United Nations, and international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties;
- vi. REAFFIRMING that the Declaration adheres to the purposes and principles of the ASEAN Charter, and international human rights standards, taking into account national and regional particularities;
- vii. ENVISAGING this Declaration as a foundational instrument to manifest common values, commitments and aspirations in the field of human rights promotion

¹³² Open letter from the Coordination Committee, as referred to by Chien-Huei Wu, ‘Human Rights in ASEAN Context: Between Universalism and Relativism’ in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma* (Springer, Berlin 2016), p. 10. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

¹³³ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 408.

and protection for the peoples of ASEAN, and as a shared vision of ASEAN for the fulfilment of the goals and objectives set forth herein, including establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;¹³⁴

Similar phrases were used in one of its general principles. While the Member States included the notion that human rights are universal in nature, they also underscored that “the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind”.¹³⁵ Reference was also made to the ASEAN Way in one of its general principles:

The promotion and protection of human rights contained in this Declaration is encouraged and realized through cooperation and consensus, and not through confrontation, interference and the imposition of incompatible values. Regional problems demand regional solutions which can only be achieved through exchanges, constructive approaches, non-departure from ideas, values and norms respected by all cultures and societies in ASEAN.¹³⁶

Although the ASEAN Way has been underscored over the years on numerous occasions, it is remarkable that neither the June draft nor the final version adopted this passage as one of its general principles. Non-confrontation and avoidance of double standards and politicisation are upheld as part of the general principles (Article 9 AHRD). It is correctly observed by Nicholas Doyle that this phrase mirrors the ASEAN Way, and the principle of non-interference especially.¹³⁷ Laos suggested that the principle of non-confrontation should always be upheld when realising the human rights and freedoms that are included in the Declaration.¹³⁸ This position appears to be adopted by its fellow Members, as this principle is included in the June draft and the final version.¹³⁹

Striking is that the June version only included commitment to the UDHR, UN Charter, Vienna Declaration and Programme of Action, and other international human rights instruments to which the ASEAN Member States are parties, thus limiting the list of human rights. The phrase that “(...) the Declaration will contribute to the ASEAN Community Building process through (...) the creation of

¹³⁴ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, preamble, on file with the author.

¹³⁵ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 15, on file with the author. Laos proposed the context of regional and national particularities bearing in mind different political, economic, social, cultural historical, and religious backgrounds (see draft Article 16).

¹³⁶ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 19, on file with the author.

¹³⁷ Nicholas Doyle, “The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting” (2014) 63 *International and Comparative Law Quarterly* 67, p. 85.

¹³⁸ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 32, on file with the author.

¹³⁹ In both documents Article 9.

an environment where the peoples of ASEAN would enjoy, to the fullest possible extent, rights and freedoms within the *regional context...*” [emphasis added] is omitted. It is striking that the references to the national and regional contexts are not included in the preamble of the June version and the final version, although it is included later on.

The inclusion of ‘regional and national contexts’ is in the final version included in Article 7 AHRD, which reads as follows:

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.¹⁴⁰

This generally corresponds to Article 5 VDPA and Article 8 of the (governmental) Bangkok Declaration (discussed in Chapter 2, Section 3.4). Since it is part of the general principles, all human rights set forth in the AHRD have to be interpreted according to the contexts and backgrounds as indicated.

The inclusion of this Article 7 led to concerns.¹⁴¹ It is recognised by some as a reawakening of the Asian values debate.¹⁴² Wu noted that this passage “recalls the ghost of the ASEAN particularities”, making the adoption of the AHRD a very modest move to universalism.¹⁴³

The Philippine member of the drafting team, on the other hand, formulated the view that the AHRD “laid to rest the Asian Values Debate and the spectre of cultural relativism”.¹⁴⁴ Renshaw argued that it can be read best between the Bangkok Declaration and the Vienna Declaration and noted:

¹⁴⁰ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 23 June 2012, Article 7, on file with the author. See also Article 7 AHRD.

¹⁴¹ Michael Vatikiotis, ‘ASEAN Needs to Embrace Human Rights’ [2017] (5) *ASEAN Focus* 11, p. 11.

¹⁴² Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 113 and David I. Fisher, ‘The ‘Regional and National Context’ Under the ASEAN Human Rights Declaration and Its Implications for Minority Rights’ (2017, draft), Faculty of Law, Stockholm University Research Paper No. 50, p. 3. Available at SSRN: <<https://ssrn.com/abstract=3076435>> last accessed 19 September 2018.

¹⁴³ Chien-Huei Wu, ‘Human Rights in ASEAN Context: Between Universalism and Relativism’ in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 9. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

¹⁴⁴ Kevin H.R. Villanueva, ‘How the West was won: ASEAN Magna Carta’ *Inquirer* (21 December 2012) <opinion.inquirer.net/43189/how-west-was-won-asean-magna-carta> last accessed 19 September 2018.

The AHRD draws attention to the fact that different political, economic, legal, social, cultural, historical and religious backgrounds should be 'borne in mind', but it does not permit States to defer to particularities of context in the realisation of rights. It is not, in this sense, an endorsement of relativism.¹⁴⁵

Renshaw's observation does not correspond with other literature that concluded that Article 7 AHRD is proposing a relativist argument. Hien Bui specifically addressed Renshaw's analysis in one of her articles, stating that the universality of human rights is stressed in Article 5 VDPA, and that "[t]he reference to 'national and regional particularities' are in this case merely supplementary considerations".¹⁴⁶ In Article 7 AHRD, however, this emphasis on the universality is ignored and "emphasizes particularism as a condition for the realization of human rights"¹⁴⁷ instead. The inclusion 'at the same time' indeed implies that relativistic attitudes are conditional, whereby the inclusion of 'while' in the VDPA denotes that particularities are allowed within the framework of the universality of human rights. In addition, Wu argued that "[t]he ASEAN human rights discourse is still haunted by regional particularities, which jealously guard sovereignty and value of the non-interference principle".¹⁴⁸

Furthermore, the following general principle was included in the January draft:

Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, [sexual identity], property, birth, disability or [other status]. No one shall be discriminated against by any public authority or any third parties on any grounds.

Malaysia commented on this article that the definition of 'other status' and 'sex' is to be determined "in the context of ASEAN Common Values and should not be governed by the definition of other status and sex as determined by the Human Rights Committee under the ICCPR and the Committee on Economic Social and Cultural Rights under the ICESCR. The views of both committees are persuasive in nature and only with reference to the State Parties to the same Covenants." This

¹⁴⁵ Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration' (2013) 13 *Human Rights Law Review* 557, p. 569.

¹⁴⁶ Hien Bui, 'The ASEAN Human Rights System: A Critical Analysis' (2016) 11 *Asian Journal of Comparative Law* 111, p. 122.

¹⁴⁷ Hien Bui, 'The ASEAN Human Rights System: A Critical Analysis' (2016) 11 *Asian Journal of Comparative Law* 111, p. 123. This line of reasoning is also confirmed by Nicholas Doyle, "The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard Setting" (2014) 63 *International and Comparative Law Quarterly* 67, p. 13.

¹⁴⁸ Open letter from the Coordination Committee, as referred to by Chien-Huei Wu, 'Human Rights in ASEAN Context: Between Universalism and Relativism' in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 11. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

State furthermore argued that these definitions should be determined by “ASEAN common values in the spirit of unity in diversity”.¹⁴⁹

While this seems reminiscent of relativistic viewpoints of the past in the form of Asian values, it would appear to be an interpretation of what is later included in the final version of the AHRD (preamble) and the Phnom Penh statement on the adoption of the AHRD. Specifically, it was stressed that the AHRD would be implemented:

in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments *to which ASEAN Member States are parties* [emphasis added]. It also affirms ASEAN’s commitment to relevant ASEAN declarations and instruments pertaining to human rights.¹⁵⁰

This phrase leads to confusion as to whether only the international instruments to which the ASEAN Member States are party are of relevance and whether all Member States have to be party to these documents. Chapter III showed that only CEDAW, CRC and CRPD have been ratified by all and that a significant number of reservations and interpretative declarations have been formulated. Interpreting the above passage in a strict manner, would be detrimental to regional human rights protection. The inclusion of national particularities and the observation that particularism is conditional for the realisation of human rights implies that an ASEAN Member State is only bound to live up to those human rights which are also endorsed in an international instrument to which this State is party. The fact that Malaysia is not a State Party to all the conventions as included in Table 1, backs up this observation. On the other hand, as reference is also made to the UDHR, the rights enshrined in this document should be respected, regardless of the question whether these specific rights are included in a convention to which the ASEAN Member States are party.

Based on the above, it can be observed that the AHRD reflects the ongoing tension among the ASEAN Member States, more specifically:

The text reflects the tension that exists in Southeast Asia between the aspiration on the part of some Southeast Asian States to endorse universal human rights and an ongoing reluctance on the part of others to cede sovereignty. The former impulse is evident in the extent to which the AHRD endorses and replicates the UDHR. The latter is evident in the specific provisions of the AHRD that defer to national law, and

¹⁴⁹ Malaysia’s comment on general principle 2, see ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, footnote 4, on file with the author.

¹⁵⁰ ASEAN, *Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration*, Phnom Penh, 18 November 2012 <<https://asean.org/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd/>> last accessed 19 September 2018.

in the broad provisions that exalt ideas about ‘the avoidance of double standards and politicisation’.¹⁵¹

Nevertheless, it remains vague what Article 7 AHRD exactly entails. Specifically, it opens up the risk for relativistic arguments, which are detrimental to the human rights as enshrined in the document. As consensual decision-making is ASEAN’s norm, it mirrors the difficult road of human rights engagement. As Davies formulated it: “This synthesis between, on the one hand, commitments to rights and, on the other, the framing of these rights within traditional ASEAN norms accommodates the progressive, cautious and recalcitrant states, each getting at least some of what they want”.¹⁵²

4.2.3 Duties and responsibilities

The January draft referred to duties and responsibilities in its preamble:

ix. EMPHASIZING the interrelatedness of rights, duties and responsibilities of the human person and the ASEAN common values in the spirit of unity in diversity in the promotion and protection of human rights, while ensuring the balance between such rights, duties and responsibilities, and the primary responsibility to promote and protect human rights and fundamental freedoms, which rests with each Member State.¹⁵³

This balancing act is also visible in the June draft and final version of the AHRD. Article 6 AHRD is formulated as one of ASEAN’s general principles and reads as follows:

6. The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives. It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.

Furthermore, when comparing the January version with the June draft, one can see that the first draft is more elaborate as it listed duties and responsibilities of the individual, the ASEAN Member States, and corporations under its general

¹⁵¹ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ (2013) 13 *Human Rights Law Review* 557, p. 578.

¹⁵² Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33 (3) *Journal of Current Southeast Asian* 107, p. 119-120, hereby also referring to Mathew Davies, ‘The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration’ (2013) 14 *Georgetown Journal of International Affairs* 51, 51–59.

¹⁵³ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, preamble, on file with the author.

principles. The June version toned down the duties and responsibilities of the ASEAN Member States and omitted the duties and responsibilities of corporations. This line was continued in the final version of the AHRD.

In all three versions it is included that a person has duties and responsibilities towards other individuals, the community and society where one lives, while the January version also included this responsibility towards families, communities, races, nations and religions as well as the international community. This draft also mentioned the idea that these duties and responsibilities “are implicit in the understanding of good citizens and responsible members of the ASEAN Community”.¹⁵⁴ As Chapter III of this research has shown, several constitutions of the ASEAN Member States expect highly of their citizens. The January version also included a similar expectancy, which reads: “The peoples of ASEAN as members of a global community have collective as well as individual duties and responsibilities to promote a culture of peace by taking appropriate actions to prevent war and foster international and regional peace, collective security and cooperation.”¹⁵⁵ The June and final version, however, did not include such high expectations. Nevertheless, according to Marzuki Darusman, this stress on the balance between rights and duties can be considered as a national and regional particularity in itself.¹⁵⁶

Renshaw rightly asserted that “[t]he idea of ‘duties’ has a clear pedigree and place in international human rights instruments”,¹⁵⁷ although the balancing act of rights against duties caused concern among civil society. Renshaw commented that this is “understandable” because of the typical understanding of duty among some governments in Southeast Asia.¹⁵⁸ She observed:

The leaders of Malaysia, Singapore, Indonesia and Myanmar have all argued, at different times, that personal rights and civil and political liberties are less important than fulfilling duties and responsibilities towards family, community and nation. In relation to ASEAN's communist members, Vietnam and Laos, the idea of balancing duties with rights is inherently problematic. In communist societies, the possession of rights is contingent on the performance of duties. [...] CSOs feared that in any balancing act between individual liberties and an individual's duty to ensure the

¹⁵⁴ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 7, paragraph 3, Article 12 and Article 14, on file with the author.

¹⁵⁵ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 8 which was proposed by Laos, on file with the author.

¹⁵⁶ Interview with Marzuki Darusman, lawyer and politician in Indonesia (Jakarta, 18 July 2012).

¹⁵⁷ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557, p. 565. In the article, she refers to the Preamble to the American Declaration of the Rights and Duties of Man, Article 29(1) UDHR, Article 32(1) the American Convention on Human Rights, the preamble of the ICCPR, and the preamble and Articles 27-29 of the African Charter on Human and Peoples' Rights.

¹⁵⁸ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557, p. 566.

cohesion and security of the State, it would be individual liberty that inevitably suffered.¹⁵⁹

In addition, while human rights bring about duties when balancing human rights, the AHRD goes a step further by subjecting all rights as included in the AHRD to a set of duties by including Article 6 AHRD as one of its general principles.

With respect to Article 6 AHRD, Bui commented that the balancing of rights and duties “is used as a tactic to impose unreasonable restrictions on rights and freedoms”.¹⁶⁰ Wu noted the concerns that were raised by the Coordination Committee of the Special Procedures of the Human Rights Council, who noted that “the stress on duties of individuals and balancing between rights and duties may bring in the danger of arbitrary, disproportionate and unnecessary restrictions on human rights and compromise the purpose and objective of human rights instruments”.¹⁶¹ Pisanò observed that while the reciprocity of Article 8 AHRD follows Article 29(2) UDHR, the first sentence of Articles 6 and 7 AHRD shows a communitarian approach in the relation between an individual and society, in which a strong correlation exists between rights and duties and the presence of social duties.¹⁶² This differs from the wording in Article 29(1) UDHR. Pisanò rightly observed the following:

This reference to the need to “balance” rights with duties marks the AHRD and, in general, the ASEAN approach to human rights. In the international scenario, it is the only human rights declaration which contains a similar reference to the balance between rights and duties, and for this reason, it was strongly criticized both by civil society organizations during the Bali Democracy Forum on 7 November 2012, and by the United Nations High Commissioner for Human Rights, who stated that “the balancing of human rights with individual duties was not a part of international

¹⁵⁹ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557, p. 566. This is also underscored by Bui, who stated “On the contrary, the balancing act imposed by ASEAN declarations not only undermines universal human rights and freedoms, but generates the basis for violations of those rights in the name of “balanc[ing] between rights and responsibilities.”, hereby referring to Amnesty International, ‘Amnesty International’s Briefing to the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children on the Draft ASEAN Declaration on the Elimination of Violence against Women and Children’ (Amnesty International Publications, London 2013), p. 12, see Hien Bui, ‘The ASEAN Human Rights System: A Critical Analysis’ (2016) 11 *Asian Journal of Comparative Law* 111, p. 125.

¹⁶⁰ Hien Bui, ‘The ASEAN Human Rights System: A Critical Analysis’ (2016) 11 *Asian Journal of Comparative Law* 111, p. 121.

¹⁶¹ Chien-Huei Wu, ‘Human Rights in ASEAN Context: Between Universalism and Relativism’ in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 10. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

¹⁶² Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 406.

human rights law, misrepresents the positive dynamic between rights and duties and should not be included in a human rights instrument”.¹⁶³

While the balancing act included in the AHRD matches the stance of the ASEAN Member States, adopting it as a general principle is thus contrary to international human rights law. This brings about a lowering of standards compared to international human rights standards and is criticised by various stakeholders.

4.2.4 Limitations of rights

The January draft included a significant number of articles in which overlapping restrictions on human rights were formulated (Articles 25-41). It was amongst others ascertained that these limitations may not be exercised contrary to the purposes and principles of the ASEAN Charter and the UN Charter. The limitations boiled down to the following: limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms and reputation of others (in a democratic society), to meet the just requirements of national security, common interest in compliance with international law, public safety, public order/law and order, public health, public morals/morality, general welfare (of the peoples in a democratic society) or to prevent crime. Malaysia suggested to also include the parameters of future generations and the State.¹⁶⁴ Laos proposed the inclusion of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation, avoidance of double standards and non-politicisation.¹⁶⁵

The June draft showed on which limitations consensus was reached. The following is formulated as one of ASEAN’s general principle, and is also included as such in Article 8 of the final version of the AHRD:

The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the people in a democratic society.¹⁶⁶

¹⁶³ Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 407 and Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557.

¹⁶⁴ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 27, on file with the author.

¹⁶⁵ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 32, on file with the author.

¹⁶⁶ ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 23 June 2012, Article 8, on file with the author. See also Article 8 AHRD.

Article 8 shows that the common interest in compliance with international law and the prevention of crime were omitted, while national security was added.

Renshaw noted that the limitations of the AHRD do not essentially differ from the limitations as included in Article 29(2) UDHR, but that Article 8 was met with scepticism because it was included as a general principle. Consequently, all the rights as enshrined in the AHRD are subjected to these limitations.¹⁶⁷ Indeed, Article 8 was criticised for being a general restriction to all human rights as included in the AHRD, which goes further than the limitations at international level,¹⁶⁸ and which is not subjected to tests of legality, legitimacy and proportionality.¹⁶⁹ Bui observed that this general restriction is “dangerous, especially for rights that have already been infringed upon by national law in some countries in the region”.¹⁷⁰

In addition, the line of reasoning with respect to the reservations of the ASEAN Member States to a number of international human rights treaties, which they ratified or acceded to, can be applied to this general principle as well. This boils down to the argument that general references that could limit the human rights, counter the object and purpose of that human rights document, which contradicts international treaty law. In addition, general reservations cast doubts on the actual willingness of the State to commit to the obligations that follow from the human rights instrument.

It can be argued that these limitations can only be applied within certain boundaries. Generally, rights can be limited when these restrictions are provided by law. They may only be imposed for the grounds mentioned in paragraph 3 and must pass the tests of necessity and proportionality. The grounds mentioned in this paragraph are respect of the rights or reputation of others, and the protection of national security, public order, public health or morals. According to the General Comment 34 of the ICCPR (2011), “the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition”. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination”.¹⁷¹

¹⁶⁷ Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557, p. 569.

¹⁶⁸ See for instance American Bar Association, *The ASEAN Human Rights Declaration: A Legal Analysis* (American Bar Association Rule of Law Initiative 2014) <<https://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>> last accessed 16 September 2018.

¹⁶⁹ Hien Bui, ‘The ASEAN Human Rights System: A Critical Analysis’ (2016) 11 *Asian Journal of Comparative Law* 111, p. 121 and Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 288.

¹⁷⁰ Hien Bui, ‘The ASEAN Human Rights System: A Critical Analysis’ (2016) 11 *Asian Journal of Comparative Law* 111, p. 127.

¹⁷¹ UN Human Rights Committee, General Comment 34 on ‘Freedom of expression and opinion’ (Article 19) of 12 September 2011, UN Doc. CCPR/C/GC/34.

The example of the ICCPR shows that the limitations as formulated by the AIHCR can also be found at the international level. Yet, some of the limitations are vague requirements for which implementation is needed to clarify their meaning. The next section, however, shows that the implementation mechanisms are defective.

While the limitation of public morality is also broadly included in international human rights instruments, the inclusion in the AHRD was subject to critique. According to Renshaw, the critique on the inclusion of public morality could be attributed to the diversity of opinions on issues of public morality in the region. Accordingly, States are given a wide discretion in determining whether freedoms should be restricted because of the preservation of public morality.¹⁷²

Davies commented that ‘morality’ suggests a far more enduring curtailment than limitations like security, order, health, and safety.¹⁷³ Civil society argued that the clause is subjective and discriminatory. Southeast Asia Women’s Caucus in ASEAN, for instance, stated that public morality is not defined and that the interpretation is based on “dominant political, cultural and religious regimes”.¹⁷⁴ Consequently, minorities and marginalised groups run the risk of being criminalised and stigmatised because their ways of life or practices are considered to contradict public morality.¹⁷⁵ In practice, the interpretation of public morality generally undermines women’s rights and of other vulnerable groups such as LGBTIs.¹⁷⁶ UN Special Rapporteur on violence against women Yatik Erturk is hereby quoted, saying:

‘Public morality’ clauses in legislation generally serves to undermine women's rights. I think the nuance between the AHRD and the UDHR is an important one, the former has a more authoritarian and coercive tone. If the UDHR was drafted today I am sure it would have reflected the same tone. Unfortunately both national security and public morality have become prioritized over human rights.¹⁷⁷

¹⁷² Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration’ 2013, 13 *Human Rights Law Review* 557, p. 571.

¹⁷³ Mathew Davies, ‘The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration’ (2013) 14 *Georgetown Journal of International Affairs* 51, p. 55.

¹⁷⁴ Claire Knox, ‘Civil Society decries ASEAN Draft Clause’ *Phnom Penh Post* (18 September 2012) <<https://www.phnompenhpost.com/national/civil-society-decries-asean-draft-clause>> last accessed 19 September 2018.

¹⁷⁵ Atnike Sigirot at the press conference of ASEAN Civil Society Organisations on the Consultation Meeting with the ASEAN Intergovernmental Commission on Human Rights, 13 September 2012; Forum Asia/Civil Society Joint Statement, ‘ASEAN Human Rights Declaration must not provide Protections lower than International Human Rights Law and Standards’ (13 September 2012) <<https://www.forum-asia.org/?p=15320>> last accessed 19 September 2018.

¹⁷⁶ —, ‘Public Morality Outrage’ *Southeast Asia Globe Magazine* (14 September 2012) <<http://sea-globe.com/public-morality-outrage/>> last accessed 19 September 2018.

¹⁷⁷ —, ‘Public Morality Outrage’ *Southeast Asia Globe Magazine* (14 September 2012) <<http://sea-globe.com/public-morality-outrage/>> last accessed 19 September 2018.

The inclusion of public morality was also a topic of debate among the AICHR Commissioners, whereby Brunei Darussalam, Singapore and Vietnam were in favour of adopting the concept, while Thailand opted against it because of the lack of definition in the UDHR.¹⁷⁸ As ‘public morality’ is included in the legal systems of Brunei Darussalam, Malaysia, Singapore and Thailand (‘good morals’), it could therefore not be omitted.¹⁷⁹ In this sense, individual Member States influenced the AHRD in such a way that is detrimental to human rights.

Furthermore, Article 40 of the final version of the AHRD includes the following phrase:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN [emphasis added], or at the destruction of any of the rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.¹⁸⁰

Davies argued that this first phrase “effectively undercuts every one of the foregoing 39 articles, as the “purposes and principles” referred to are the traditional state-centric ones that have served ASEAN since its creation in 1967”.¹⁸¹ According to this author, this article can be understood as a self-limiting clause because the provisions of the AHRD are made subordinate to the principles of non-intervention and sovereign equality. Yet, this conclusion does not give the complete picture as the AHRD also refers to upholding the international level. Moreover, while the ASEAN way is included in the ASEAN Charter in Article 2(2)(a), 2(2)(e), and 2(2)(f), the Charter also includes “adherence to the rule of law, good governance (and) the principles of democracy” (Article 2(2)(h) ASEAN Charter), and “respect for fundamental freedoms, the promotion and protection of human rights” (Article 2(2)(i) ASEAN Charter). these principles are all formulated as the general principles of the AHRD, these principles need to be upheld next to the principles distinctive of the ASEAN Way.

Reference was also made to the *ius cogens* norms in the January draft, as Article 35 formulated the following:

No limitations or derogations are permitted in regard to those rights guaranteed absolutely in international law, in particular the right to life, freedom from slavery, prohibition of torture, prohibition of imprisonment for non-fulfilment of contractual

¹⁷⁸ —, ‘Public Morality Outrage’ *Southeast Asia Globe Magazine* (14 September 2012) <<http://sea-globe.com/public-morality-outrage/>> last accessed 19 September 2018.

¹⁷⁹ Burma Partnership, ‘AHRD is hijacked by Narrow-minded National Interests’ (Manila, 13 September 2012) <<http://www.burmapartnership.org/2012/09/ahrd-is-hijacked-by-narrow-minded-national-interests/>> last accessed 19 September 2018.

¹⁸⁰ Article 40 AHRD.

¹⁸¹ Mathew Davies, ‘An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia’ (2014) 33 (3) *Journal of Current Southeast Asian Affairs* 107, p. 114.

obligation, no retroactive criminal law, recognition as a person before the law, freedom of thought, conscience and religion or beliefs.¹⁸²

This article is not included in the June draft and the final document. Instead, the limitations to human rights are formulated as part of the AHRD's general principles. This implies that this principle also applies to *ius cogens* norms, which are non-derogable rights (see Chapter II). Indeed, civil society organisations voiced their concern that these limitations could even limit the non-derogable rights, such as the right to life and freedom from torture, slavery and religion, which are included in the AHRD.¹⁸³ This is, however, not in line with the status of *ius cogens* norms guaranteed in international law.

From this analysis it follows that Article 8 was also a compromise, whereby the influence of some ASEAN Member States caused a lowering of standards compared to international human rights. In addition, Article 8 has been formulated as a general restriction and applicable to all human rights as included in the AHRD, which detracts from the international level. The article becomes especially problematic with respect to the *ius cogens* norms that are included in the AHRD, as these norms are non-derogable rights. Article 35 of the January draft was ultimately omitted. A possible explanation could be that it was considered superfluous given the nature of *ius cogens* norms. On the other hand, by setting the limitations as a general principle, thereby making it applicable to *ius cogens* norms, it is questionable whether this is actually the case. Regardless of the actual motivation, the AHRD runs counter to international human rights law by structuring the limitations as a general principle. The gap between the AHRD and international level becomes possibly even bigger because effective implementation mechanisms to clarify the meaning of the limitations are lacking. Although the inclusion public morality in the AHRD corresponds to the inclusion of this restriction in a number of the ASEAN Member States, this limitation proved to be especially problematic. Finally, the self-limiting clause of Article 40 AHRD has also been criticised. Based on this article, the provisions of the AHRD are made subordinate to the ASEAN Way, although ASEAN's new principles that are more favourable to human rights must also be respected.

¹⁸² ASEAN, *ASEAN Human Rights Declaration, Working Draft*, 8 January 2012, Article 35, on file with the author.

¹⁸³ Burma Partnership, 'AHRD is hijacked by Narrow-minded National Interests' (Manila, 13 September 2012) <<http://www.burmapartnership.org/2012/09/ahrd-is-hijacked-by-narrow-minded-national-interests/>> last accessed 19 September 2018 and Forum Asia/Civil Society Joint Statement, 'ASEAN Human Rights Declaration must not provide Protections lower than International Human Rights Law and Standards' (13 September 2012) <<https://www.forum-asia.org/?p=15320>> last accessed 19 September 2018.

5 ASEAN'S HUMAN RIGHTS INSTITUTIONS

5.1 Introduction

The ASEAN Charter includes human rights as part of its general principles and enumerates the ASEAN Intergovernmental Commission on Human Rights as one of ASEAN's organs. The previous section showed that human rights cooperation is mainly part of the ASEAN Security Community, while human rights references are also found in the ASEAN Socio-Cultural Community. The AICHR is the key human rights body of the organisation, which follows for example from the Terms of References of the ASEAN Intergovernmental Commission on Human Rights and ASEAN Commission on Women and Children. Specifically, these documents state that the AICHR is "the overarching human rights institution" for human rights (Articles 6.8 ToR AICHR and 7.7 ToR ACWC). Moreover, the establishment of the AICHR is based on Article 14 ASEAN Charter, making the Commission one of the organs that are stipulated in the ASEAN Charter.

The other human rights bodies are the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC), which was inaugurated on 7 April 2010,¹⁸⁴ and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), which met for the first time in September 2008.¹⁸⁵ The ASEAN Commission on Women and Children falls within the ASEAN Socio-Cultural Blueprint and follows from the ambition to establish an ASEAN Commission on the promotion and protection on the rights of women and children (Article C.27.1 ASCC Blueprint). The ASEAN Committee on Migrant Workers follows from the ASEAN Declaration on the Protection and Promotion of the Right of Migrant Workers.

This section first focuses on the ASEAN Intergovernmental Commission on Human Rights before moving on to the ASEAN Commission on Women and Children and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The AICHR is hereby discussed more elaborately given its status as ASEAN's overarching human rights body. Given the similarities between the ToRs of the

¹⁸⁴ ASEAN, 'Inaugurated: ASEAN Commission on the Promotion and Protection of the Rights of Women and Children Ha Noi, 7 April 2010' (Hanoi, 7 April 2010), <http://asean.org/?static_post=inaugurated-asean-commission-on-the-promotion-and-protection-of-the-rights-of-women-and-children-ha-noi-7-april-2010> last accessed 19 September 2018 and ASEAN, 'Speech by H.E. Prime Minister Nguyen Tan Dung, at the Inauguration of the ASEAN Commission on Promotion and Protection of the Rights of Women and Children (ACWC) (Hanoi, 7 April 2010).

¹⁸⁵ ASEAN, 'Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers', 30 July 2007 <https://asean.org/?static_post=statement-of-the-establishment-of-the-asean-committee-on-the-implementation-of-the-asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers> last accessed 19 September 2018.

AICHR and the ACWC, a number of the observations also apply to the ACWC. The ACMW does not have a ToR, but a Work Plan is available.

5.2 The ASEAN Intergovernmental Commission on Human Rights

Although the ASEAN Foreign Ministers agreed to consider a regional human rights mechanism in their 1993 Joint Communiqué during the 26th ASEAN Summit,¹⁸⁶ human rights as topic of common concern was formalised in the 2007 ASEAN Charter. Whereas human rights are mentioned in the preamble, the purposes, and principles of ASEAN, the ASEAN Charter also included the establishment of an ASEAN Human Rights Body (AHRB) and designated it as one of its organs.

The inclusion of an AHRB¹⁸⁷ was the most sensitive and controversial topic during the drafting process of the ASEAN Charter. First point for debate was the desirability to establish such a body. The second point of contention was the content of the Terms of Reference. Against this background and the diversity among the Member States as States Parties to the core UN human rights instruments, the variation of fundamental rights in their constitutions and the existence of National Human Rights Institutions that are accredited with the A-status in only three ASEAN Member States, it was difficult to agree on an ASEAN Human Rights Body.

Aung Bwa observed that the main points of concern were the risk of politicising human rights, the concern for applying double standards and the stress of adopting a gradual approach.¹⁸⁸ Although this former member of the ASEAN High Level Task Force for the ASEAN Charter did not specify exactly what he meant, his observations can be interpreted as follows. Human rights run the risk of becoming politicised because of the ASEAN Way, which often trumps human rights in ASEAN. In addition, criticising each other's human rights violations could lead to double standard as all ASEAN Member States have human rights issues. While the stress of adopting a gradual approach based on the lowest common denominator is a consequence of the ASEAN way, Djamin noted on his own role within the AICHR, just after he was appointed as Indonesia's Commissioner in 2009, that consensual decision making also brings about that he as a more progressive representative should also agree.¹⁸⁹ This observation is in line with the description of Capie and

¹⁸⁶ ASEAN Ministerial Meeting, *Joint Communiqué of the 26th ASEAN Ministerial Meeting*, Singapore, 23-24 July 1993, <http://asean.org/?static_post=joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993>, last accessed 10 September 2018.

¹⁸⁷ The AHRB, later AICHR, was not initiated by the EPG to be part of the ASEAN Charter. Instead, it became subject of debate during the discussions in the HLTF and the ASEAN Foreign Ministers; Rosario G. Manolo, 'Drafting ASEAN's Tomorrow: The EPG and the ASEAN Charter' in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009) p. 43.

¹⁸⁸ Aung Bwa, 'The Jewel in my Crown' in Tommy Koh, Rosario G. Manolo and Walter Woon, *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore 2009), p. 32-33.

¹⁸⁹ Interview with Rafendi Djamin, Regional Director for South East Asia and Pacific of Amnesty International and former Executive Director of the Human Rights Working Group as well as former

Evans of the “level of comfort” whereby the pace is not “too fast for those who want to go slow and not too slow for those who want to go fast.”¹⁹⁰ The negotiations led to Article 14 of the ASEAN Charter:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.¹⁹¹

Terms of Reference

The Terms of Reference (ToR) of the Commissioners was drafted by the High Level Panel on drafting the Terms of Reference of the ASEAN Human Rights Body, which was established by the ASEAN Foreign Ministers. Following the 41st ASEAN Ministerial Meeting (Singapore, 21 July 2008),¹⁹² the High Level Panel commenced its work.¹⁹³

Muntarbhorn observed that “[i]ntrinsically, the position adopted from the beginning of the discourse envisioned that the human rights body should be realistic, effective and credible, and address human rights in an evolutionary way”.¹⁹⁴ Point of critique was that the drafting process lacked transparency and consultation with civil society.¹⁹⁵

Indonesian Representative for the ASEAN Intergovernmental Commission on Human Rights from 2009-2015 (Jakarta, 19 October 2009). This line of reasoning is also reflected in the general observation of Medina, who noted that the developments within ASEAN go according to the most conservative State only to a certain extent, as it does not mean that “the more progressive States just let it be, because they also do what they can to push these [conservative] countries. So, they will not force the issue since in ASEAN decisions are made by consensus. But they will make their sentiments known.”; Interview with Carlos Medina, Director of the Ateneo Law Faculty’s Human Rights Center at Ateneo de Manila University (Manila, 10 November 2009).

¹⁹⁰ This was uttered with respect to the ASEAN Regional Forum, but applies to the ASEAN in general; David Capie and Paul Evans, *The Asia-Pacific Security Lexicon* (updated 2nd edn, ISEAS Publishing, Singapore 2007), p. 12.

¹⁹¹ Article 14 ASEAN Charter.

¹⁹² ASEAN Ministerial Meeting, *Joint Communiqué of the 41st ASEAN Ministerial Meeting "One ASEAN at the Heart of Dynamic Asia"*, Singapore, 21 July 2008, <<http://asean.org/joint-communicue-of-the-41st-asean-ministerial-meeting-one-asean-at-the-heart-of-dynamic-asia/>> last accessed 19 September 2018.

¹⁹³ ASEAN, *Terms of Reference for the High Level Panel on an ASEAN Human Rights Body*, Singapore, 21 July 2008 <<http://www.asean.org/storage/images/archive/HLP-TOR.pdf>> last accessed 15 September 2018.

¹⁹⁴ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 128.

¹⁹⁵ James Munro, ‘The Relationship between the Origins and Regime Design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)’, 15 *The International Journal on Human Rights* 1185, p. 1189.

During the 15th ASEAN Summit, the inauguration of AICHR took place,¹⁹⁶ together with the endorsement of the final version of its Terms of Reference.¹⁹⁷ At this Summit, the significance of the Commission was expressed in the following manner:

The importance of the AICHR [is emphasized] as a historic milestone in ASEAN community-building process, and as a vehicle for progressive social development and justice, the full realization of human dignity and the attainment of a higher quality of life for ASEAN peoples.¹⁹⁸

The ToR stipulates the mandate of the AICHR in Article 4:

- 4.1. To develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community;
- 4.2. To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;
- 4.3. To enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information;
- 4.4. To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;
- 4.5. To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments;
- 4.6. To promote the full implementation of ASEAN instruments related to human rights;
- 4.7. To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;
- 4.8. To engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;
- 4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;
- 4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights;

¹⁹⁶ ASEAN, *Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, Cha-am Hua Hin, 23 October 2009, available at <<http://hrlibrary.umn.edu/research/Philippines/Cha-Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf>> last accessed 19 September 2018.

¹⁹⁷ ASEAN, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, October 2009 <<http://aichr.org/documents/>> last accessed 19 September 2018. The first draft of the ToR was submitted by the HLP to the Foreign Ministers Meeting of 27 February 2009. The endorsement of the ToR by the ASEAN Foreign Ministers Meeting preceded the formal approval of the Summit, which took place at the 42nd Foreign Ministers Meeting (Ch-am, 28 February-1 March 2009).

¹⁹⁸ ASEAN, *Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, Cha-am Hua Hin, 23 October 2009, available at <<http://hrlibrary.umn.edu/research/Philippines/Cha-Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf>> last accessed 19 September 2018.

- 4.11. To develop common approaches and positions on human rights matters of interest to ASEAN;
- 4.12. To prepare studies on thematic issues of human rights in ASEAN;
- 4.13. To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and
- 4.14. To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting.^{199 200}

The reference to upholding international human rights standards is important, that is to say, the UDHR, the 1993 Vienna Convention and the international human rights instruments to which the Member States are party (Article 1.6 ToR).²⁰¹ As discussed in the previous section, the criticism has been that it restricts the focus to only those human rights instruments to which the ASEAN Member States are party. In addition, it is unclear whether this only includes the instruments to which *all* the Member States are party.

While AICHR could theoretically build upon and provide an enrichment to human rights law when upholding and complementing international human rights standards. Christof Heyns and Magnus Killander, are rightly concerned with the other side of the coin, namely, that such systems can detract from the universalist aspirations of the international level. In this sense, regionalism in the field of human

¹⁹⁹ ASEAN, *ASEAN Intergovernmental Commission on Human Rights (Terms of Reference)*, October 2009, Article 4 <<http://aichr.org/documents/>> last accessed 19 September 2018.

²⁰⁰ During the 7th Workshop on the ASEAN Regional Mechanism on Human Rights (Singapore, 12-13 June 2008), the Workshop envisioned that the ToR of AHRB could empower the AHRB in the following way: “i. mandated to carry out state and/or thematic reporting coupled with an optional protocol to conduct investigations upon complaints by individuals in accordance to international standards and broadly, with the power to assess situations and advise member countries; ii. with the power to promote and protect human rights; iii. to provide for effective implementation of the ASEAN Human Rights body’s findings and adequate resources for its operations. iv. to provide that the appointment of its members should be carried out in consultation with civil society groups, NHRIs and other stakeholders transparently; v. to provide public education with respect to human rights; vi. to study and promote relevant human rights treaties; vii. to promulgate human rights declarations on behalf of ASEAN; viii. to consult with NGOs, NHRIs and other stakeholders; ix. to appoint a human rights coordinator to advocate in development and work of ASEAN councils, networks of existing NHRIs; and x. to engage in capacity building in the implementation and encouraging compliance with human rights treaties”; see Working Group for an ASEAN Human Rights Mechanism, ‘7th Workshop on the ASEAN Regional Mechanism on Human Rights. Summary of Proceedings’ (Singapore, 12-13 June 2008) <<http://aseanhrmech.org/downloads/7th%20WS%20Summary%20Proceedings%20final.pdf>> last accessed 19 September 2018.

²⁰¹ Muntarhorn observed that during the drafting of the ToR it was debated whether it should concern the international human rights documents to which all the Member States are party, but the word ‘all’ did not make it to final text, implying that is also the instruments to which some are party, must be upheld; Vitit Muntarhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 132.

rights can either form a “platform” for human rights or a “shield” against outside scrutiny.²⁰² In case of the AICHR, the picture is mixed.

Heyns and Killander for instance observed that an earlier draft of the AICHR’s ToR moved towards the direction of the AICHR as a ‘human rights shield’ since the Commissioners were initially required to “[d]efend ASEAN in the case of external interference in the domestic affairs of ASEAN member states relating to human rights.”²⁰³ Although this was omitted in the final version of the ToR, there is a risk that the AICHR is a human rights “pretender” instead of a human rights “protector”.²⁰⁴

Based on Article 14(1) ASEAN Charter, conformity with the purposes and principles of the ASEAN Charter is required, which includes the ASEAN Way. In addition, the ToR was determined by the ASEAN Foreign Ministers Meeting, which, as expected, gave a restrictive mandate to the AICHR. Following from the ToR, the ASEAN Ministerial Meeting is also the recipient of the (annual) reports of the AICHR and may assign the Commission other tasks than the responsibilities that are included in the ToR. In this way, the independence and credibility of the Commission is compromised. Wu noted in this respect that this “suggests that it does not enjoy competence-competence; in other words, it is not in a position to decide its own jurisdiction.”²⁰⁵ This corresponds to the viewpoint of one of the then ASEAN Officials as ChalermPALANUPAP stated that the ASEAN Human Rights Body is an organ within ASEAN, and it is not intended to be an independent watchdog.²⁰⁶

Furthermore, Article 1.4 ToR AICHR requires its Members:²⁰⁷

²⁰² Christof Heyns and Magnus Killander, 'Towards Minimum Standards for Regional Human Rights Systems' in Mahnouch H. Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff Publishers, Leiden 2011), p. 528.

²⁰³ Christof Heyns and Magnus Killander, 'Towards Minimum Standards for Regional Human Rights Systems' in Mahnouch H. Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff Publishers, Leiden 2011), p. 529 and High Level Panel, *Terms of Reference of an ASEAN Human Rights Body, Draft*, 15 January 2009, <<https://www.scribd.com/document/12882981/Draft-of-ASEAN-Human-Right-Body>> last accessed 19 September 2018.

²⁰⁴ In line with the wordings of Christof Heyns and Magnus Killander, 'Towards Minimum Standards for Regional Human Rights Systems' in Mahnouch H. Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff Publishers, Leiden 2011), p. 530.

²⁰⁵ Chien-Huei Wu, 'Human Rights in ASEAN Context: Between Universalism and Relativism' in Chang-fa Lo, Nigel Li & Tsai-yu Lin (eds), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor Herbert Han-Pao Ma*. (Springer, Berlin 2016), p. 6. Available at SSRN: <<https://ssrn.com/abstract=2920471>> (last accessed 10 September 2018).

²⁰⁶ Interview with Termsak ChalermPALANUPAP, the then Director of the Political and Security Directorate, ASEAN Secretariat (Jakarta, 14 October 2009).

²⁰⁷ The members of the AICHR are called Representatives instead of Commissioners, given their lack of independence.

[t]o promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious background, and taking into account the balance between rights and responsibilities.

As observed throughout this research, this could downgrade international human rights standards. Rathgeber rightfully noted in this respect:

Thus, the AICHR and the ASEAN Declaration will go against core elements, including the universality, of the UN's view of human rights. Such a misuse of the regional framework is not beyond ASEAN's scope of realistic action, as ASEAN includes countries with a long track record of notorious human rights violations. The current regional framework allows for the possibility that international human rights law will be undermined.²⁰⁸

Moreover, Article 2.1 ToR stipulates that the work of the AICHR should be placed within the framework of the principles enshrined in Article 2 ASEAN Charter. A number of these principles restrict the Commissioners in their work, especially respect for independence, sovereignty, equality and national integrity of the ASEAN Member States (principle a in the AICHR's ToR), non-interference in the internal affairs (principle b), and the principle of respect of the rights of the ASEAN Member States to lead is national existence without external interference, subversion and coercion (principle c). In addition, the ToR mentions that the Commission has a subsidiary role to the Member States (Article 2.3), that it has to be constructive and non-confrontational in its course of action (Article 2.4), and that its work has an evolutionary approach (Article 2.5).

It is striking that human rights and the principles that contribute to their promotion and protection are mentioned after these 'ASEAN Way' principles in Article 2.1(d) to (g) and Article 2.2). Although it is natural to find these principles in an organisation, the analysis of the ASEAN Way (Chapter IV, Section 3) illustrated that ASEAN developed its *modus operandi* by its ongoing stress on these principles throughout the years. This has a detrimental effect on the promotion and above all the protection of human rights, since human rights are still a sensitive topic given the human rights record of the Member States. In particular, together with the principle of non-interference and the need for an evolutionary approach, these principles restrict the work of the AICHR, especially in terms of protecting human rights.

This could explain the emphasis in the ToR's on the promotional aspect rather than on protection while the ToR mentions both aspects (Article 1.1). The actual manner in which the protection of human rights must be executed is not clarified. Muntarhorn commented in this respect that protection raised sensitive issues during the drafting. In international law, this often implies monitoring, investigations, on

²⁰⁸ Theodor Rathgeber, 'Human Rights and the Institutionalisation of ASEAN: An Ambiguous Relationship' (2104) 33 (3) *Journal of Current Southeast Asian Affairs* 131, pp. 162-163.

site visits and complaint procedures for individuals and groups, while the High Level Panel did not want to include these elements in the text.²⁰⁹ Furthermore, Medina also observed that one “cannot find words which are associated with interference, monitor, investigate in the functions of the commission”.²¹⁰ The AICHR can neither make recommendations to ASEAN States. Effective human rights protection proves thus to be a long-term goal.

Other reasons to be reserved from a universalistic point of view can be found in, for example, Article 3 ToR. This article determines that “[t]he AICHR is an inter-governmental body and integral part of the ASEAN organisational structure. It is a consultative body”. According to civil society, the credibility of the Commission is affected in the sense that the Commission is lacking independence and teeth.²¹¹

Chalermpananupap, former Director of the Political and Security Directorate of ASEAN, commented that it was not intended to give the AICHR such traits given its position inside ASEAN’s organisational structure.²¹² In fact, he argued that this critique “is to bark up the wrong tree”. Just as to every organ of ASEAN, the ASEAN Way is also applicable to the AICHR. He continued: “No ‘biting’ is ever required. ASEAN would not have come this far if its member states wanted to bite one another with sharp teeth just to get things done their own way”.²¹³ He also added that the Commission is an “ongoing evolutionary process”, and that “it would be unrealistic for anyone to expect the ASEAN human rights body to be a ‘Big Bang’”.²¹⁴ While this ‘Big Bang’ cannot be expected indeed, the score-card that is used by Forum Asia based on the Paris Principles, and a Non-Paper, “Principles for Regional Human Rights Mechanisms” of the OHCHR, is illustrative. Specifically, it shows that the AICHR only scored positive on the following seven points.²¹⁵ According to the score card, the AICHR is only mandated to engage in the following topics: (1) to make recommendations and proposals to de Member States, (2) to request for information from the Member States, (3) to report on general

²⁰⁹ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 130.

²¹⁰ Interview with Carlos Medina, Director of the Ateneo Law Faculty’s Human Rights Center at Ateneo de Manila University (Manila, 10 November 2009).

²¹¹ See for example Forum-Asia, (2009) 5 (2) *Asian Human Rights Defender*.

²¹² Termsak Chalermpananupap, ‘Life in ASEAN after the Entry in Force of the ASEAN Charter. Implications and Follow-Ups’ in Sivakant Tiwari (ed), *Life after the ASEAN Charter* (ISEAS Publishing, Singapore 2010), p. 49.

²¹³ Ary Hermawan, ‘AICHR: ASEAN’s Journey to Human Rights’, *The Jakarta Post* (Jakarta, 1 November 2010) <<http://www.thejakartapost.com/news/2010/01/11/aicmr-asean%E2%80%99s-journey-human-rights.html>>.

²¹⁴ Termsak Chalermpananupap, ‘Life in ASEAN after the Entry in Force of the ASEAN Charter. Implications and Follow-Ups’ in Sivakant Tiwari (ed), *Life after the ASEAN Charter* (ISEAS Publishing, Singapore 2010), p. 49.

²¹⁵ Pisanò lists the number of commonalities between the AICHR and NHRIs: the mandate on the protection and promotion of human rights, linking human rights norms at the international level to the domestic level, and creating a bridge to assure state compliance with its international legal obligations; Attilio Pisanò, ‘Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration’ (2014) 15 *Human Rights Review* 391, p. 401.

human rights themes, (4) to have an advisory function to the Member States, (5) responsibilities with respect to disseminating information and education, (6) to ensure a balance of nationalities within the Commission, and (7) diplomatic immunity by the Commission Members.²¹⁶

Article 5 ToR was also met with scepticism. In this article, the impression is given that the Commissioners are State representatives as it states that each AICHR Commissioner is appointment by and accountable to their government while acting impartially (Article 5.2 ToR). In addition, the respective government can also decide to replace its Representative according to Article 5.6 ToR.

Muntarbhorn commented in this respect that the majority from the outset rejected independence during the drafting of the ToR.²¹⁷ As mentioned before, this was also acknowledged by Chalermpananupap, who stated that the AICHR “is never intended to be any independent watchdog” and that “like all other ASEAN organs or bodies, the ASEAN Human Rights Body shall operate through consultation and consensus, with firm respect for sovereign equality of all member states”.²¹⁸

Nevertheless, while critique on the mandate of the AICHR is justified, the ToR does provide the Commission important competences. Awareness raising and capacity building contribute to developing a meaningful regional human rights system. Dialogue with relevant actors is also imperative. Of special importance is the mandate to develop common approaches and positions on human rights matters of interest to ASEAN and to prepare thematic human rights studies, which open up possibilities for further developing the protection mandate of the Commissioners.

Other important elements are the mandate to encourage Member States to ratify the core international human rights instruments (Article 4.5 ToR) and Article 1.5 ToR, which stipulates that regional cooperation should be enhanced in order to complement initiatives in the promotion and protection of human rights that are taken at the national and the international level. This implies that the AICHR could form a bridge between the two levels, possibly reduce the gap between the national and international level, hereby taking the international level as the starting point while still allowing room for particularities.

This corresponds to the way in which an international human rights framework should interweave with the lower levels. This is for example visible in the margin of appreciation doctrine of the European Court of Human Rights. This Court takes the internationally protected human rights as a starting point. At the same time, the Court leaves room for diversity among the Member States of the Council of Europe

²¹⁶ Human Rights in ASEAN-Online Platform, ASEAN Intergovernmental Commission on Human Rights, Score Card <<https://humanrightsinasean.info/asean-intergovernmental-commission-human-rights/score-card.html>> last accessed 19 September 2018.

²¹⁷ Viti Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 139.

²¹⁸ Termsak Chalermpananupap, ‘10 about ASEAN Human Rights Cooperation’ (date unknown) www.asean.org/storage/images/archive/HLP-OtherDoc-1.pdf last accessed 19 September 2018. Also discussed during an interview in 2009; Interview with Termsak Chalermpananupap, the then ASEAN Director of the Political and Security Directorate (Jakarta, 14 October 2009).

in their interpretation of human rights by allowing a certain margin of appreciation to the these States.

Guidelines on the Operations of the AICHR

The AICHR's work is also based upon the Guidelines on the Operations of the AICHR (initially called the Rules of Procedure).²¹⁹ These Guidelines were adopted in March 2012, but may be amended in the future. The instrument gives more information on the AICHR's procedural aspects. It continues the line of the previous documents, as it includes the following:

As the overarching institution responsible for the promotion and protection of human rights in ASEAN, the AICHR shall:

- i) Recommend that all ASEAN sectoral bodies dealing with human rights, adhere to the international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties, as well as to ASEAN instruments relating to human rights, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and duties.

Specifically, the Guidelines deal with the format of the meetings, agenda, notification and representation, chairmanship, documentation, summary records, public communication, the establishment of a working group or task force, reporting procedure, the relationship with other ASEAN bodies, interaction with entities associated with ASEAN and other stakeholders, representation at regional and international events, resource mobilisation and utilisation, and support from the ASEAN Secretariat.

Even though there is overlap with the ToR, a number of elements are noteworthy. First of all, the ToR overrides the Guidelines in case of inconsistency between the two documents (Article 15.3), making the ToR more important than the Guidelines. With respect to the AICHR's mandate, the following is stipulated. Article 1.4 stipulates that the AICHR may invite others to its meetings, provided that consensus is reached, which is discussed on a case by case basis. In addition, the public information materials of Article 6.7 ToR are more detailed. These include press releases and press conferences and other publications, disseminated through the website of ASEAN and other media. This led the development of the AICHR's own website, which provides information on the AICHR, its activities, and its key documents.

Moreover, the Guidelines of Operations form the basis for the possibility to establish ad-hoc working groups or task forces to support the work of the

²¹⁹ ASEAN/AICHR, *Guidelines on the Operations of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, Jakarta, 12 March 2012 <<http://aichr.org/documents/>> last accessed 19 September 2018.

Commission (Article 8.1). Accordingly, the Drafting Group on the ASEAN Human Rights Declaration was established, which led to the development of the AHRD. Pisano observed in this respect:

Yet, there is a fundamental element which distinguishes the AICHR from the other regional commissions, namely that it was not created during a regional process to develop a regional human rights system based on a regional human rights declaration or convention. The AHRD was drafted by the AICHR, which is different from other cases where the regional commission was created within the same international agreement which states a regional definition of human rights. ASEAN, in fact, created a commission on human rights without a regional agreement on the rights which were to be promoted. Therefore, the compliance towards the international human rights system (based on the three pillars of the UDHR, Vienna World Conference, and Core Human Rights Treaties ratified by ASEAN countries), which is key to political commitment in the AHRD, is even more important because it places the sources of the AICHR beyond the narrow confines of ASEAN.²²⁰

It is of note that the ASEAN Ministerial Meeting decides whether the reports of the AICHR that are submitted to them based on Article 6.6 ToR are released or not. This affects the AICHR's transparency, accountability and legitimacy. Specifically, this brings challenges for the AICHR's possibilities to become a credible Commission and to contribute to ASEAN's ambition to become more people-oriented. Indeed, the AICHR is dependent from the ASEAN Ministerial Meeting and shuts off NGO participation in its human rights engagements, while NGOs are playing a key role in developing ASEAN's regional human rights cooperation.

The Five-Year Work Plans of the AICHR

The Work Plans explicate the AICHR's programmes and activities. The AICHR developed separate priority programmes and activities for the periods 2010-2011²²¹ and 2012²²² as the drafting of the first Work Plan took longer than anticipated.²²³ To

²²⁰ Attilio Pisanò, 'Human Rights and Sovereignty in the ASEAN Path Towards a Human Rights Declaration' (2014) 15 *Human Rights Review* 391, p. 400.

²²¹ Adopted at the 43rd ASEAN Foreign Ministers Meeting; ASEAN, *Joint Communiqué of the 43rd ASEAN Foreign Ministers Meeting "Enhanced Efforts towards the ASEAN Community: from Vision to Action"* Hanoi, 19-20 July 2010 <https://asean.org/?static_post=joint-communicue-of-the-43rd-asean-foreign-ministers-meeting-enhanced-efforts-towards-the-asean-community-from-vision-to-action-hanoi-19-20-july-2010-3> last accessed 19 September 2018.

²²² Finalised at the Seventh Meeting; ASEAN/AICHR, 'Press release of the Seventh Meeting of the ASEAN Intergovernmental Commission on Human rights (AICHR)' (Kuala Lumpur, 22-23 June 2012) <<http://aichr.org/press-release/the-seventh-meeting-of-the-asean-intergovernmental-commission-onhuman-rights-aichr/>> last accessed 19 September 2018.

²²³ The Rules of Procedure and the Five-Year Work were initially scheduled to be submitted to the 43rd ASEAN Ministerial Meeting for adoption; ASEAN/AICHR, 'Press Statement by the Chair of the ASEAN Intergovernmental Commission on Human Rights on the First Meeting of the ASEAN Intergovernmental Commission on Human Rights' (Jakarta, 1 April 2010) <<http://aichr.org/press-release/asean-intergovernmental-commission-on-human-rights-terms-of-reference/>> last accessed 19 September 2018. At the 43rd ASEAN Ministerial Meeting, only the budget for the High Priority

date, two Work Plans were formulated: the first was formulated for the period from 2010 until 2015, the second for 2016 until 2020. Both Work Plans are structured according to the mandate of the AICHR as formulated in Article 4 ToR. In addition, the following aspiration was formulated in both documents:

AICHR desires that the ASEAN Community shall be free from fear, war aggression and poverty. The peoples of ASEAN shall enjoy the right to live in peace, dignity and prosperity. There shall be a balance between rights, duties and responsibilities of individuals in the context of the ASEAN Community. The Member States of ASEAN and all sectors of their respective societies have the shared responsibility to ensure the promotion and protection of these rights and duties.²²⁴

The objective of the first Work Plan was to realise the AICHR's ToR:

To that end, the Work Plan is aimed at realizing the aspiration of the people of ASEAN on human rights, strengthening AICHR, promoting awareness on human rights in ASEAN and enhancing cooperation with external partners, as well as to implement AICHR's overarching mandate on human rights, thereby contributing to the successful building of an ASEAN Community by 2015.²²⁵

The Work Plan stipulated that the participation of various sectors of society in the implementation of the Work Plan is determined by the AICHR, "(...) taking into consideration the need to encourage as broad a participation as possible".²²⁶

Programmes and Activities of the AICHR 2010-2011 instead of the whole Work Plan was submitted by the AICHR and adopted by the Ministers; ASEAN, *Joint Communiqué of the 43rd ASEAN Foreign Ministers Meeting "Enhanced Efforts towards the ASEAN Community: from Vision to Action"* Hanoi, 19-20 July 2010 <https://asean.org/?static_post=joint-communique-of-the-43rd-asean-foreign-ministers-meeting-enhanced-efforts-towards-the-asean-community-from-vision-to-action-ha-noi-19-20-july-2010-3> last accessed 19 September 2018. The complete Work Plan 2010-2015 is posted on the AICHR's website; ASEAN/AICHR, *Five Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010-2015)*, Jakarta, 2010 <<http://aichr.org/documents/>> last accessed 19 September 2018. The Rules of Procedure, entitled 'The Guidelines on the Operations of the AICHR' serve as a concretisation of the ToR and give details the AICHR's everyday business and on its relation with other ASEAN bodies, entities associated with ASEAN, and external parties; ASEAN/AICHR, *Guidelines on the Operations of the ASEAN Intergovernmental Commission on Human Rights (AICHR)*, Jakarta, 12 March 2012 <<http://aichr.org/documents/>> last accessed 19 September 2018.

²²⁴ ASEAN/AICHR, *Five Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010-2015)*, Jakarta, 2010 <<http://aichr.org/documents/>> last accessed 19 September 2018 and ASEAN/AICHR, *Five year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2016-2021)*, adopted on 15 June 2015, approved at the 48th ASEAN Ministerial Meeting, Kuala Lumpur, 3 August 2015 <<http://aichr.org/documents/>> last accessed 19 September 2018.

²²⁵ ASEAN/AICHR, *Five Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010-2015)*, Jakarta, 2010, preamble <<http://aichr.org/documents/>> last accessed 19 September 2018.

²²⁶ ASEAN/AICHR, *Five Year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2010-2015)*, Jakarta, 2010 under I. Principles <<http://aichr.org/documents/>> last accessed 19 September 2018.

This ambition was, however, not in line with practice as, for example, the entities associated with ASEAN remain limited (see Annex II of the ASEAN Charter).

The ToR's mandate and functions (Article 4 ToR) were concretised in more detail in the Work Plan. Ways to implement Article 4.1 ToR were for example dialogue and consultation with all three Communities and the formulation of recommendations for these Communities. Also, the review process of the ToR had to start in 2014 to identify ways and means to strengthen the mandate of the AICHR. Regarding the ASEAN Declaration (Article 4.2 ToR), the Work Plan mentioned the establishment of a task force to draft the ASEAN Human Rights Declaration, for which the ToR was adopted during the fifth meeting of the AICHR (Jakarta, 25-29 April 2011).²²⁷ In addition, the AICHR should assess the status of existing human rights mechanisms and instruments in ASEAN and strengthen the framework of legal cooperation on human rights (Mandate 4.2 Work Plan).

Remarkable is the AICHR's ambition to work to ASEAN Conventions on Human Rights after the adoption of the ASEAN Declaration on Human Rights (AHRD) and their support to the development of other legal human rights instruments by other ASEAN sectoral bodies (Mandate 4.2 Work Plan). This implies that the AICHR strives for the development of a legally binding framework, thus leaving less space for political influence as has been the case so far. However, ASEAN does not have, nor does it desire to have, a supranational character. This makes it difficult to ensure compliance.

Public awareness was raised by disseminating information about the AICHR and its work, road shows on human rights and the AICHR, holding workshops and mapping human rights education programs in the ASEAN region (Mandate 4.3 Work Plan). While the AICHR's is often criticised for giving too much weight to awareness raising at the expense of protecting human rights, it is argued that this element is also necessary for the basic understanding on human rights among ASEAN citizens.

The Work Plan touched upon a critical factor in human rights protection, namely, the promotion of capacity building to ensure effective implementation of international human rights treaty obligations by the AICHR (Mandate 4.4 Work Plan). Indeed, capacity building on the implementation of international framework would benefit the implementation of the regional framework as well. Both frameworks are encouraged by the AICHR (Mandate 4.5 and 4.6 Work Plan). In addition, the AICHR would hold consultations with the ASEAN (Sectoral) Bodies and entities associated with ASEAN (Mandate 4.8 and 4.9 Work Plan).

The AICHR also included the ambition to learn from other national, regional and international institutions and other human rights mechanisms. Furthermore, the AICHR ambioned to use the reporting procedure of the UN system, as it strived to

²²⁷ ASEAN/AICHR, 'Press Release of the Fifth ASEAN Intergovernmental Commission on Human Rights', ASEAN Intergovernmental Commission on Human Rights (AICHR) (Jakarta, 25-29 April 2011) <<http://aichr.org/press-release/press-release-of-the-fifth-asean-intergovernmental-commission-on-human-rights-asean-secretariat/>> last accessed 19 September 2018.

obtain these reports and additional information to these reports (Mandate 4.10 Work Plan). Cooperation with and reporting obligations to other ASEAN bodies was incorporated in Mandates 4.7, 4.13 and 4.14.

According to the Work Plan, the AICHR would also identify current and potential human rights matters relevant to ASEAN (Mandate 4.11 Work Plan). The thematic studies could be used to gain insight into ASEAN's common human rights issues. According to the Work Plan, the following thematic studies would be carried out by the AICHR: corporate social responsibility, migration, trafficking in persons particularly women and children, child soldiers, women and children in conflicts and disasters, juvenile justice, the right to information in criminal justice, the right to health, the right to education, the right to life and the right to peace (Mandate 4.12 Work Plan).

The work of the AIHCR in the first five years is continued under the current Work Plan, in which the promotion and the implementation of the AHRD and the Phnom Penh Statement is continued. In addition, the ambition is uttered to engage with ASEAN Organs and ASEAN Bodies that deal with human rights. Specifically:

[T]he Work Plan is aimed at realizing the aspiration of the people of ASEAN on human rights, strengthening AICHR, promoting and protecting human rights in ASEAN and enhancing cooperation with external partners, as well as to implement AICHR's overarching mandate on human rights, thereby contributing to the successful building of an ASEAN Community and beyond.²²⁸

This Work Plan also lists focal points that are structured according to the mandate of the AICHR and mentions the years in which a number of these action points are taken up. The Work Plan overlaps with the previous Work Plan because it is a continuation of the first. Nevertheless, the following observations can be made on the current Work Plan. Regarding mandate 4.1, it is striking that the AICHR focuses on women, girls and children (as well as persons with disabilities), as the ASEAN also established the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children. On mandate 4.3, promotional activities on the AHRD, the AICHR itself and corporate social responsibility are added. The encouragement of information sharing on the implementation of the Convention on the Rights of Persons with Disabilities is added to the mandate under 4.5. With respect to mandate 4.6, promotional activities on enhancing the role of people with disabilities and access to education for children with disabilities is included, as well as activities with respect to the AHRD, the Phnom Penh statement and other ASEAN instruments on human rights. Dialogue with civil society organisations that have a "consultative relationship" and regional stakeholders is also added (mandate 4.8). The Work Plan omitted the topics of corporate social responsibility and child

²²⁸ ASEAN/AICHR, *Five year Work Plan of the ASEAN Intergovernmental Commission on Human Rights (2016-2021)*, adopted on 15 June 2015, approved at the 48th ASEAN Ministerial Meeting, Kuala Lumpur, 3 August 2015 <<http://aichr.org/documents/>> last accessed 19 September 2018.

soldiers in its list of thematic studies and added the topics of legal aid and the freedom of religion and belief (Mandate 4.12). The AICHR only disseminated its thematic study on women in natural disasters on its website, so it is unclear whether the AICHR completed a thematic study on corporate social responsibility and child soldiers. It seems that the AICHR has conducted work in the area of corporate social responsibility, as awareness raising and information sharing on corporate social responsibility and human rights is now included in the Work Plan.

5.3 The ASEAN Commission for the Promotion and Protection of the Rights of Women and Children

While the AICHR is the overarching human rights body of the organisation (Article 6.8 ToR of the AICHR), the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children is ASEAN's additional human rights commission which seeks alignment with the AICHR (Article 7.7 ToR of the ACWC). Women as a topic of common concern is a long-standing tradition within ASEAN and dates back to 1975, when the ASEAN Women Leaders' Conference was held. In addition Muntarbhorn observed that "[t]he seeds for an ASEAN Commission on the rights of women and children were sown as far back as the mid-1990s, when the Civil Society Group for an ASEAN Human Rights Mechanism implied this as one of the options for a mechanism in the region".²²⁹

The idea to establish such a commission was uttered in the Vientiane Action Programme²³⁰ and reiterated in its successor, the Roadmap for an ASEAN Community (2009-2015). This Roadmap determined that the ACWC falls within the ASEAN Socio-Cultural Community²³¹. Consequently, the Commission has to submit its annual reports to the ASEAN Ministers Meeting on Social Welfare and Development.

The ToR of the ACWC was formulated by a Working Group that had two representatives per Member State; one focussing on women and the other on children. Whereas the ToR was adopted on October 2009,²³² the actual inauguration of the ACWC took place in Hanoi on 7 April 2010, around a half year after the

²²⁹ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 149.

²³⁰ ASEAN, *Vientiane Action Programme*, 29 November 2004 <<http://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf>> last accessed 15 September 2018.

²³¹ ASEAN, *Roadmap for the ASEAN Community (2009-2015)*, Cha-am, 1 March 2009 <http://www.asean.org/storage/images/ASEAN_RTK_2014/2_Roadmap_for_ASEAN_Community_20092015.pdf> last accessed 19 September 2018 and ASEAN, *ASEAN Socio-Cultural Community Blueprint*, Cha-am, 1 March 2009, Section C.1 <<http://asean.org/wp-content/uploads/archive/5187-19.pdf>> last accessed 15 September 2018.

²³² ASEAN, *Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children*, Cha-Am, 24 October 2009 <<http://www.asean.org/storage/images/archive/documents/TOR-ACWC.pdf>> last accessed 19 September 2018.

AICHR.²³³ The ACWC is influenced by the work done with respect to the AICHR, as is visible in the parallels in the bodies' ToRs. This is also the case with respect of the lack of mandate to receive and investigate complaints on human rights violations and the lack of guaranteeing independence, although the need to act impartially in accordance with the ASEAN Charter and the ToR is also underscored. In line with the ASEAN Way, the Commissioners also base their decision making on consultation and consensus.

Regarding the purposes (Articles 2.1-2.6 ToR) Muntarbhorn observed that they underscore the empowerment and participation angles, and that they list a more detailed set of instruments for guidance than the ToR of the AICHR.²³⁴ In addition, he correctly noted that the functions are listed in greater detail; there is a role in capacity/information building, mobilisation/dissemination with more specific articles on (data) disaggregation, and prevention.²³⁵

Article 5 of the ToR list the mandate of the ACWC, which boils down to the following:

- 5.1. To promote the implementation of international instruments, ASEAN instruments and other instruments related to the rights of women and children.
- 5.2. To develop policies, programs and innovative strategies to promote and protect the rights of women and children to complement the building of the ASEAN Community.
- 5.3. To promote public awareness and education of the rights of women and children in ASEAN.
- 5.4. To advocate on behalf of women and children, especially the most vulnerable and marginalised, and encourage ASEAN Member States to improve their situation.
- 5.5. To build capacities of relevant stakeholders at all levels, e.g. administrative, legislative, judicial, civil society, community leaders, women and children machineries, through the provision of technical assistance, training and workshops, towards the realisation of the rights of women and children.
- 5.6. To assist, upon request by ASEAN Member States, in preparing for CEDAW and CRC Periodic Reports, the Human Rights Council's Universal Periodic Review (UPR) and reports for other Treaty Bodies, with specific reference to the rights of women and children in ASEAN.
- 5.7. To assist, upon request by ASEAN Member States, in implementing the Concluding Observations of CEDAW and CRC and other Treaty Bodies related to the rights of women and children.
- 5.8. To encourage ASEAN Member States on the collection and analysis of disaggregated data by sex, age, etc., related to the promotion and protection of the rights of women and children.

²³³ ASEAN, 'Inaugurated: ASEAN Commission on the Promotion and Protection of the Rights of Women and Children' (Hanoi, 7 April 2010), <https://asean.org/?static_post=asean-bulletin-april-2010#Article-2> last accessed 19 September 2018.

²³⁴ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 152.

²³⁵ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 155.

- 5.9. To promote studies and research related to the situation and well-being of women and children with the view to fostering effective implementation of the rights of women and children in the region.
- 5.10. To encourage ASEAN Member States to undertake periodic reviews of national legislations, regulations, policies, and practices related to the rights of women and children.
- 5.11. To facilitate sharing of experiences and good practices, including thematic issues, between and among ASEAN Member States related to the situation and well-being of women and children and to enhance the effective implementation of CEDAW and CRC through, among others, exchange of visits, seminars and conferences.
- 5.12. To propose and promote appropriate measures, mechanisms and strategies for the prevention and elimination of all forms of violation of the rights of women and children, including the protection of victims.
- 5.13. To encourage ASEAN Member States to consider acceding to, and ratifying, international human rights instruments related to women and children.
- 5.14. To support the participation of ASEAN women and children in dialogue and consultation processes in ASEAN related to the promotion and protection of their rights.
- 5.15. To provide advisory services on matters pertaining to the promotion and protection of the rights of women and children to ASEAN sectoral bodies upon request.
- 5.16. To perform any other tasks related to the rights of women and children as may be delegated by the ASEAN Leaders and Foreign Ministers.²³⁶

The Commission can build upon ASEAN's previous work, as this research shows that in the past initiatives are already taken in the area of women and children. Moreover, the ToR links up to CEDAW, CRC and the Universal Periodic Review. The ACWC has a solid basis in CEDAW and the CRC, as all ASEAN Member States are party to these conventions. Nevertheless, it is important to bear in mind that a significant number of reservations and interpretative declarations were uttered that lowered the standards set in these instruments (see Chapter III, Section 2).

The ACWC also has its own Rules of Procedures, which are the guidelines for the work of the Commission and is divided in nineteen rules on the following topics: meetings, decision making, agenda, conduct of business, participation, documentation, summary records, communications, representatives, (vice-)chair, establishment of committees or working groups, reporting procedure, interaction with governments of ASEAN Member States, relationship with other ASEAN Sectoral Bodies, representation of the ACWC at regional and international events, external relations of the ACWC, resource mobilisation and utilisation, support from the ASEAN Secretariat, general and final provisions.²³⁷

²³⁶ ASEAN, *Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children*, Cha-Am, 24 October 2009 <http://www.asean.org/storage/images/2012/Social_cultural/ACW/TOR-ACWC.pdf> last accessed 19 September 2018.

²³⁷ ASEAN/ACWC, *Rules of Procedure for the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children*, November 2012 <<http://www.asean.org/wp->

A Work Plan was formulated for the period 2012-2016,²³⁸ although the Commission should have a five-year work plan according to its Article 8.1 ToR. This Work Plan dealt with the following areas: strengthening institutional capacity of ACWC, the promotion of consultation and dialogue with stakeholders at national and regional levels, the elimination of violence against women and children, the right of children to participate in all affairs that affect them, trafficking in women and children, women participation in politics and decision making, governance and democracy, the promotion and protection of the rights of women and children with disabilities, a Child Protection System, the right to early childhood and quality education, promoting implementation of international, ASEAN and other instruments related to the rights of women and children, gender equality in education, women and children living with and affected by HIV and AIDS, social impact of climate change on women and children, strengthening economic rights of women with regards to feminisation of poverty, women's rights to land and property, adolescent physical and mental health, active ageing among women, gender perspective in policies, strategies and programmes for migrant workers, and gender mainstreaming.

According to a press release of the 13th meeting of the ACWC (Singapore, 3-5 October 2016), the Work Plan for 2016-2020 was finalised. Although the ACWC did not publish the current Work Plan on its website, according to the press release, builds upon the previous work plan. The following thematic project areas are included:

- (i) strengthening institutional capacity of ACWC,
- (ii) elimination of violence against women and children,
- (iii) the right of children to participate in all affairs that affect them,
- (iv) trafficking in women and children, (v) promotion and protection of the rights of women and children with disabilities,
- (v) Child Protection System: Comprehensive / Integrative Approach for Children in Need for Special Protection (e.g. victims of abuse and neglect, trafficking, child labour, children affected by statelessness, undocumented migrant children, HIV/AIDS, natural disaster, conflicts, and children in juvenile justice system / children in conflict with the law);
- (vi) the right to early childhood and quality education,
- (vii) promoting implementation of international, ASEAN and other instruments related to the rights of women and children,
- (viii) gender equality in education (textbook, curriculum, equal access), (x) social impact of climate change on women and children,
- (ix) strengthening economic rights of women with regards to feminization of poverty, women's rights to land and property,
- (x) adolescent physical and mental health,

content/uploads/images/2013/resources/publication/ASEAN%20ACWC.pdf> last accessed 19 September 2018.

²³⁸ ASEAN/ACWC, *ACWC Work Plan*, Jakarta, 2-5 July 2018 <<http://www.asean.org/wp-content/uploads/images/2013/resources/publication/ASEAN%20ACWC.pdf>> last accessed 19 September 2018.

- (xi) gender perspective in policies, strategies and programmes for migrant workers,
- (xii) gender mainstreaming,
- (xiii) women participation in politics and decision making, governance and democracy, and
- (xiv) early marriage.²³⁹

A score-card was also made for this Commission, which only scored on the following points: (1) power to make recommendations and proposals to Member States, (2) power to report on general human rights themes, (3) to have advisory function to Member States, (4) public information/education function, (5) all Commissioners have knowledge of women or child Rights, (6) ensure a balance of nationalities within commission, and (7) commission members have diplomatic immunities and privileges. Compared to the AICHR, this Commission does not have the power to request information from Member States. In addition, the Commission is also not independent, makes decision based on consensus, has no protection mandate and has limited opportunities to engage with civil society.²⁴⁰

5.4 The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

Subsequent to the adoption of the Declaration at the 12th ASEAN Summit, the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers was established. At this Summit, the ASEAN Member States:

Task the relevant ASEAN bodies to follow up on the Declaration and to develop an ASEAN instrument on the protection and promotion of the rights of migrant workers, consistent with ASEAN's vision of a caring and sharing Community, and direct the Secretary-General of ASEAN to submit annually a report on the progress of the implementation of the Declaration to the Summit through the ASEAN Ministerial Meeting.²⁴¹

²³⁹ ASEAN/ACWC, 'The 13th ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) Meeting, <<http://asean.org/the-13th-asean-commission-on-the-promotion-and-protection-of-the-rights-of-women-and-children-acwc-meeting/>> last accessed 19 September 2018.

²⁴⁰ Human Rights in ASEAN-Online Platform, ASEAN Commission on the Rights of Women and Children, Score Card <<https://humanrightsinasean.info/asean-commission-women-and-children/score-card.html>> last accessed 19 September 2018.

²⁴¹ ASEAN, *ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers*, Cebu, 13 January 2007 <http://asean.org/?static_post=asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers-3> last accessed 19 September 2018.

In line with this provision, it was agreed that the Committee should ensure effective implementation of the Declaration and facilitate the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers.²⁴²

Muntarbhorn correctly observed that the ACMW is the only ASEAN Committee which is based on a special Declaration instead of the Charter.²⁴³ Another distinctive feature is that “it is a coordinating committee between ASEAN countries, open to officials who interlink as part of the bureaucratic process, rather than a committee geared to promote and protect rights in the sense of the AICHR and ACWC and to act ‘impartially’”.²⁴⁴ The AMCW divided its work into four “thrust areas”:

1. Step up protection and promotion of the rights of migrant workers against exploitation and mistreatment,
2. Strengthen protection and promotion of the rights of migrant workers by enhancing labour migration governance in ASEAN countries,
3. Regional cooperation to fight human trafficking in ASEAN,
4. Develop an ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers.²⁴⁵

Regarding the functions of this Committee, it is unclear what is meant by the phrase that the Committee will “explore all avenues to achieve the objectives of the Declaration”.²⁴⁶ The other functions mainly involve sharing best practices on how to promote and to protect the rights of migrant workers, and also the further improvement of cooperation and assistance, data sharing, harmonisation between the sending and receiving states, and the development of an ASEAN instrument.

The Committee cannot enforce workers’ rights. While protection is mentioned, there is an even more limited space for the Commission on protecting human rights. Muntarbhorn noted in this respect that “its scope is more confined than that of the

²⁴² ASEAN, ‘Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers’, Manila, 30 July 2007, Purpose of the Committee, Article 1 <https://asean.org/?static_post=statement-of-the-establishment-of-the-asean-committee-on-the-implementation-of-the-asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers> last accessed 19 September 2018.

²⁴³ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 159.

²⁴⁴ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 159.

²⁴⁵ Human Rights in ASEAN-Online Platform, ASEAN Committee on Migrant Workers, <<https://humanrightsinasean.info/asean-committee-migrant-workers/about.html>> last accessed 19 September 2018.

²⁴⁶ ASEAN, ‘Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers’, Manila, 30 July 2007, Purpose of the Committee, Article 1 <https://asean.org/?static_post=statement-of-the-establishment-of-the-asean-committee-on-the-implementation-of-the-asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers> last accessed 19 September 2018.

AICHR and ACWC in that its mandate is to help implement the said declaration rather than fulfil a function of promotion and protection of migrant workers in the broader sense”.²⁴⁷ In addition, it was reasoned that protection would also go too far for the ACMW due to the ASEAN Way and the stress on non-interference.

The decision making process is included in its ToR, which determines that [d]ecision making will be made at the ACMW Meeting and if necessary for decisions to be made in between meetings, the Committee will use ad-referendum mechanism. Adequate time will be given to Member States to review issues presented by ad-referendum”.²⁴⁸

In 2009, the ASEAN Socio-Cultural Community Blueprint reaffirmed the Declaration on Migrant Worker Rights, as the protection and promotion of the rights of migrant workers as one of its strategic objectives (Section C.2). The ACMW reports to the Senior Labour Officials Meeting.

The ACMW agreed to convene a drafting team on the creation of a Drafting Committee on the ASEAN Instrument for the Protection and Promotion of the Rights of Migrant Workers. This Drafting Committee initially consisted of governments representatives of Indonesia, Malaysia, the Philippines and Thailand, but was later expanded to all Member States because of a negotiation deadlock. This resulted to a ‘Zero Draft’ instrument, which forms the basis for consensus building on each of the draft articles. To date, no instrument resulted from these negotiations yet.

6 CONCLUSION

While the previous chapter illustrated that ASEAN made progress on its cooperation in terms of substance and level of formality, this chapter specifically focuses on the inclusion of human rights as topic of common concern in the work of ASEAN.

In 1993, a common stance was determined on the consideration of a regional human rights mechanism in reaction to the 1993 Vienna Declaration and Programme of Action. While ASEAN addressed the development of a regional human rights mechanism, some of its Member States underscored that the region had its own set of Asian values that had to be considered when talking about human rights in Asia. Even though these values were proposed as commonly shared values throughout Asia, critique came from other Asian States and civil society organisations that the Asian values debate was politically used as an excuse for not complying with international human rights standards. While the Asian values argument was damped with the Asian financial crisis of 1997-98, the existence of

²⁴⁷ Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 155.

²⁴⁸ ASEAN, *Terms of Reference ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, reprinted in Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Nijhoff Law Specials, Brill, Leiden 2013), p. 250.

particularities cannot be denied. This is – naturally – not distinctive for the ASEAN region as human rights are implemented and interpreted in a certain way given different contexts across the world.

The inclusion of human rights in ASEAN developed in an evolutionary way and advanced together with the increasing level of integration over the years. Significant steps were taken to entrench human rights co-operation deeper in ASEAN's structure. Specifically, with the adoption of the Pillar structure of the ASEAN Community, human rights were mainly included in the ASEAN Political-Security Blueprint and the ASEAN Socio-Cultural Community. Human rights in general are included in the Political-Security Blueprint, whereas the rights of vulnerable groups are included in the ASEAN Socio-Cultural Community. This implies that ASEAN considers human rights primarily in terms of security, while vulnerable groups are considered qualitatively differently and less threatening. This could explain that ASEAN focussed on vulnerable groups before it addressed human rights in general by adopting the ASEAN Human Rights Declaration.

While human rights were, in a similar vein to topics in other areas of cooperation, included in non-binding declarations, the level of formality increased with the adoption of the ASEAN Charter. This Charter, together with the further development of the ASEAN Community Pillars and the establishment of the ASEAN Intergovernmental Commission on Human Rights as ASEAN's overarching human rights body, led to the ASEAN Human Rights Declaration. Furthermore, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers were established next to the AICHR, mirroring the emphasis on the rights of this groups as a red line through ASEAN's human rights engagement over the years.

With respect to the content of human rights, this chapter has shown that the AHRD can be considered as a compromise between the ASEAN Member States. In particular, the drafts unveiled a common ground and the lack thereof.

Nevertheless, the final version of the AHRD shows that it is overall moving beyond the fundamental rights that are included at the national levels. The inclusion of civil and political rights in the AHRD goes especially beyond those recognised by the majority of the Member States. The AHRD also differs from the constitutions by not restricting the rights to ASEAN citizens (except for the right to vote).

A compromise between the ASEAN Member States is visible when reading the AHRD in light of the UDHR. The reference in the AHRD to the UDHR could be considered as an indication that the ASEAN Member States have the ambition to live up to international human rights standards and contribute to the universality of human rights. However, from closer reading follows that not all elements of the UDHR and subsequent UN human rights instruments are taken on board in the AHRD. This affects the universality of human rights at the level of concepts.

Specifically, the AHRD omits elements of rights, while they are included in the UDHR or the UN's core human rights treaties and their optional protocols. Omitted are the prohibition of the death penalty, the prohibition of enforced disappearances, the freedom from forced labour, the principle of *non-refoulement* and the freedom of association, equality in and a just and favourable remuneration for work, the right to rest and leisure, the right to a social and international order in which the rights of the Declaration can be fully realised, and the right to self-determination and the rights of indigenous peoples. Social security is not included when formulating the right to an adequate living standard. The freedom to manifest and change one's of religion is replaced with the prohibition of intolerance, discrimination and incitement of hatred. The right to found a family lacks the prohibition of discrimination.

The AHRD also expands and clarifies the UDHR. Smuggling or trafficking in persons, including for the purpose of trafficking in human organs is included when formulating the prohibition on servitude and slavery. Furthermore, the article on the family as the natural and fundamental unit of society and the right to (dissolve) a marriage reflects a more institutional and communitarian conception of the relationship between individuals and family.

The AHRD lists a number of rights and principles that are not included in the UDHR. The AHRD explicitly mentions that the rights of specific vulnerable groups are inalienable, integral and an indivisible part of human rights and fundamental freedoms. *Ne bis in idem*, the prohibition of economic and social exploitation of children and young persons, non-discrimination of people suffering from communicable diseases are also included, whereas motherhood is also given more attention. The right to an adequate standard of living, the right to development and a safe, clean and sustainable environment and the right to peace, harmony and stability in the region are included as part of the third generation of human rights.

A number of general principles of the AHRD are addressed in this chapter that deviate from the international human rights regime. Together with a number of missing aspects of human rights, it can be concluded that the AHRD is substandard to the UN human rights regime, which affects the universality of human rights in terms of concepts.

Moreover, the conclusion can be drawn that in some cases the AHRD detracts from the universality of human rights at the level of conceptions. In particular, Article 6 AHRD subjects all rights as included in the AHRD to a set of duties. This chapter shows that this can be considered as a way to impose unreasonable, possibly politically motivated restrictions upon human rights norms and would thus be contrary to international human rights law.

Article 7 AHRD stresses the importance of national and regional particularities, dealing with human rights the ASEAN Way. It was observed that this article makes particularism conditional for the realisation of human rights, hereby ignoring the universality of human rights. The AHRD reflects the ongoing tension among the ASEAN Member States to endorse international human rights standards as

formulated in UN conventions on the one hand, and the reluctance to make concessions on State sovereignty on the other. Furthermore, a number of rights enshrined in the AHRD are subjected to national laws. This goes for, amongst other things, the right to life, the right to seek asylum, the right to a nationality, the right to marry, found a family or divorce, the right to be elected and to vote, and the right to form and join trade unions. In addition, the age limit of child labour and the period of special protection to mothers is left to the discretion of the Member States. Subjecting these rights to national laws is in many ways contrary to international human rights law and raises doubts on the actual commitment of the States towards these rights.

Article 8 AHRD enumerates the limitations. It was criticised for being a general restriction to all human rights, which goes further than the limitations at the international level. Such general reservations cast doubts on the actual willingness of the State to commit to the obligations that follow from UN human rights instruments. Moreover, the inclusion of the limitations as a general principle implies that even *ius cogens* might be subjected to the limitations, while this is not possible given the character of these rights. Reference to ‘public morality’ as a ground for imposing limitations shows to be especially problematic.

The self-limiting clause (Article 40 AHRD) subordinates the provisions of the AHRD to ASEAN’s purposes and principles. This includes the principles that are part of the ASEAN Way. Consequently, there is a risk that this provision undermines the human rights that are formulated on this. The article’s reference to international human rights instruments to which the Member States are parties, nuances the critique. It is unclear whether all Member States have to be party to these human rights instruments, or whether this article also refers to human rights conventions to which a number of ASEAN Member States are parties.

While human rights were taken up as areas of cooperation, the ASEAN Way affects the development of a human rights mechanism in a way that the mechanisms installed in ASEAN detract from the universality of human rights at the level of implementation. Overall, it can be concluded that the development of ASEAN’s human rights mechanisms is restricted by the ASEAN Way as *modus operandi*, which led amongst others to the critique on the AICHR for lacking teeth. The principles of State sovereignty, non-interference and non-confrontation, for example influence the mandate of the human rights institutions. Consequently, these institutions are mainly involved in human rights promotion, instead of protection.

Nevertheless, the initiatives demonstrate that ASEAN is increasingly including human rights in its cooperation. Moreover, the development of a meaningful human rights system cannot happen overnight, as the set-up of human rights systems in other regions has shown. Steps have been taken by incorporating human rights as an area of cooperation in the ASEAN Communities, adopting a human rights declaration and establishing regional human rights institutions. Albeit ASEAN

could learn from the other existing human rights systems, it is not realistic and reasonable to expect a fully-fledged human rights system on short term.

In addition, this chapter has shown that there are possibilities to further develop the AICHR's mandate by progressively interpreting the ToR. It has also been argued that the margin of appreciation of the European Court of Human Rights might form a source of inspiration for the AICHR. Although ASEAN does not have a court as the Council of Europe does, the AICHR could use this concept. In light of, for instance, the values of consensus, non-interference and the idea of moving forward based on the lowest common denominator, the AICHR could look into specific human rights abuses, conduct research on the way in which human rights are interpreted by its Member States, ascertain the level of consensus and 'persuade' the lowest common denominator into a certain direction. In this way, a Member States' practice is evaluated against the (consensual) practice of the other Members. In doing so, progress could be made within the boundaries of the ASEAN Way.

CHAPTER VI

OVERALL CONCLUSIONS

1 INTRODUCTION

This study has been concluded just after ASEAN turned 50 years. In this five-decade period, ASEAN has expanded in terms of Member States and areas of cooperation, including in the field of human rights. The current research focuses on the issue whether and to what extent the ASEAN human rights system, with all its characteristics, is in accordance with international human rights law. As formulated in Chapter I, the research is captured in the following main research question:

(How) does the development of a human rights system in the ASEAN context build upon and/or detract from the claim to the universality of human rights?

The research focuses on the substance, as well as the procedural aspects of ASEAN's human rights system. Regarding the substance, it concerns the space provided for developing and establishing human rights standards that take existing particularities in the ASEAN region into consideration. The procedural aspect focuses on the mechanisms used for the promotion and protection of human rights.

In this research, the choice is made to focus on the normative legal human rights standards as adopted by ASEAN and its Member States when analysing the characteristics of ASEAN's regional human rights system. Consequently, this research aims to discover what is (at least) formally endorsed in ASEAN and in the legal domain of the ASEAN Member States with respect to human rights. This normative legal analysis at the national level of the Member States forms the background and basis of the research on ASEAN's regional human rights engagement. In this way, certain particularities and the position of ASEAN and its Member States towards the claim to the universality of human rights were able to be unveiled. With respect to the procedural aspects, the research focuses on ASEAN's human rights mechanisms and the three National Human Rights Institutions that are accredited with the A-Status according to the Paris Principles, which could be considered as the national counterparts to ASEAN's human rights mechanisms.

To this end, Donnelly's idea of the relative universality of human rights has been adopted. This notion takes the universality of human rights as the starting

point, but acknowledges that human rights are relative to various factors (such as culture, economic development and time). In this study, Donnelly's three-level scheme of the universality of human rights is discussed, developed further and applied to ASEAN's human rights system and its Member States.

2. THREE LEVELS OF UNIVERSALITY

Donnelly's three-tiered scheme of the universality of human rights is discussed and developed in Chapter II of this study. The levels of concepts, conceptions and implementation are interpreted as follows and used as the framework in which the development of a human rights system in the ASEAN region is scrutinised:

1. Concepts: Which human rights are included in ASEAN's human rights system (including norms of *ius cogens*)? The focal points of this analysis are the ASEAN Human Rights Declaration and the constitutions of the ASEAN Member States.
2. Conceptions: Interpretations and restrictions of human rights in ASEAN and their conformity to international human rights law. The focus lies on the declarations and reservations presented at the moment of ratification of or accession to UN core human rights instruments and on fundamental rights in the Member States' constitutions.
3. Implementation: The way in which human rights are legally protected and promoted in ASEAN's human rights mechanisms. The focus here lies on the ASEAN Way and the ASEAN Intergovernmental Commission on Human Rights.

Donnelly argued that the space for legitimate variation is the least at the level of concepts, and the greatest at the level of implementation. He also argued that the levels of interpretation and implementation are matters of legitimate variation, as long as "they fall within the range of variation consistent with the overarching concept."¹ In other words, the universality of human rights exists according to Donnelly in its most absolute form at the level of concepts. Divergence on the other two levels can, however, still lead to a degree of universality of human rights. In the aforementioned interpretation of concepts, conceptions and implementation, this degree of variation remains applicable.

The line of reasoning in this concluding chapter is as follows. A regional human rights system is only one of the levels in which human rights protection and promotion takes place. While the protection and promotion of human rights is nowadays part of international law, it originates from the national level. Today, the international framework of the United Nations forms the overall context in which human rights protection and promotion takes place. Whereas the national and

¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press, Ithaca 2013), p. 103.

international levels were already present in the ASEAN region, its regional level developed last. The development of a human rights system at this level compliments other regional organisations of which human rights are (part of) their domain, such as the Council of Europe, the European Union, the Organisation of American States and the African Union.

The three levels are not, however, isolated islands, but instead complement each other, whereby the regional level also functions as a bridge between the national and international frameworks. National constitutions guarantee fundamental rights at the level of States. In addition, States have become party to core UN human rights conventions, bringing the international level in many ways into the domestic domain. As regional organisations comprise individual States, the national and regional levels influence each other. A two-way street also lies between individual States and regional organisations on the one hand, and international law on the other, as these States and organisations exist within the international realm.

As said, this research focuses on the regional human rights system of ASEAN and its Member States in relation to the claim to the universality of human rights at the levels of concepts, conceptions and implementation. These elements are discussed in the following sections.

2.1 Universality in terms of concepts

Donnelly argued that consensus is reached on human rights at the level of “the concept, an abstract, general statement of an orienting value”,² which are embodied in the UDHR. He described that most appeals on relativism fail, especially with respect to the abstract and general statements in Articles 3-12 UDHR. Civil rights such as the freedom of conscience, speech and association and economic, social and cultural rights are considered by Donnelly slightly more relative. Nevertheless, divergence at this level is not that great. Donnelly underscored the necessity to search for divergence in definitions and implicit limitations, although one should be wary of “overstating their importance of misinterpreting their character.”³ In other words, according to Donnelly this divergence is not so great and systematic that it challenges the consensus reached in terms of concepts.

The ASEAN Member States adopted the ASEAN Human Rights Declaration on Human Rights in 2012. Whereas ASEAN focused on vulnerable people prior to the adoption of this declaration, the ASEAN Human Rights Declaration is the organisation’s first general human rights instrument. Therefore, the choice is made to analyse this declaration in assessing whether ASEAN underscores the

² Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 94. In later work, he argued that functional and overlapping consensus universality lie primarily at this level; Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 *Human Rights Quarterly* 281, p. 299.

³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca 2003), p. 95.

universality of human rights in terms of concepts. Based on the analysis in the previous chapters, the following conclusions can be drawn.

Norms of *ius cogens*

While the universality of human rights at the level of concepts can to a limited extent differ in Donnelly's framework of universality of human rights, this study argues that *ius cogens* norms form the exception. In Chapter II it was argued that these rights are the ultimate rights on which worldwide overlapping consensus is reached. Due to their traits, they deserve specific attention when discussing this level of universality.

Based on Articles 53 and 64 Vienna Convention on the Law of Treaties, no derogation is permitted from these peremptory norms of general international law. However, the content of *ius cogens* norms is ambiguous. Chapter II focused on rights that are considered to be *ius cogens* norms. It is argued that presently these norms include the prohibition of slavery and slave trade, racial discrimination, aggression and genocide, the prohibition of torture, cruel, inhuman or degrading punishment, arbitrary arrest and detainment, advocacy of national, racial or religious hatred, denial of freedom of thought, conscience and religion, the right to a fair trial and the presumption of innocence, the right to marry and the rights of minorities to enjoy their own culture, as well as basic rules of international humanitarian law applicable in armed conflict and the right to self-determination of peoples. This is not an exhaustive list and it evolves over time. For instance, the prohibition of applying the death penalty to juveniles and the principle of *non-refoulement* are considered to be evolving into peremptory norms.⁴

These norms affect the universality in terms of concepts as well as conceptions, the second level of universality (discussed in the next section). Due to the nature of *ius cogens* norms and the implications that follow from classifying them as the ultimate rights at the level of concepts, ASEAN's human rights system needs to be in line with this framework. This does not mean that the region cannot add human rights standards to the norms that are considered to be *ius cogens* norms. De Schutter posed in this respect that this approach towards the universal nature of human rights, expressed in globally valid *ius cogens* norms, might be too restrictive. In his view, regional courts for instance can come to the conclusion that certain principles are *ius cogens* norms as well, even if they would be 'only' valid in that particular region.⁵

⁴ Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 65 and Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2nd ed, Cambridge University Press, Cambridge 2014), p. 88.

⁵ For instance, the Inter-American Court clarified in its advisory opinion that "equality before the law, equal protection before the law and non-discrimination belongs to *ius cogens*." Inter-American Court of Human Rights, Advisory Opinion OC-18/03 on '*Juridical Condition and Rights of Undocumented Migrants*', 17 September 2003, para. 97-101 and Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, Cambridge 2010), p. 65-66.

The following can be concluded on ASEAN's position on *ius cogens*. Article 35 of the draft on the ASEAN Human Rights Declaration of January 2012, which was part of the document's general principles, included an explicit reference to *ius cogens* norms. This draft article was not included in the final version of the AHRD.

Norms which were included as *ius cogens* norms in the January draft were freedom from slavery, prohibition of torture, prohibition of imprisonment for non-fulfilment of contractual obligation, no retroactive criminal law, recognition as a person before the law, freedom of thought, conscience and religion or beliefs.

The reason for omitting this draft article is unclear. A possible explanation could be that the ASEAN Member States could not reach consensus on the list of the norms of *ius cogens*. The analysis of the constitutions of the ASEAN Member States in Section 3 of Chapter III does not provide insight into a possible common ground with respect to norms which are regarded as norms of *ius cogens*. Specifically, Indonesia is the only Member State that formulated a list of non-derogable rights in its constitution. According to this Member State, the right to life, freedom from torture, thought and conscience, religion and enslavement, recognition as a person before the law, and the rights not to be tried under a law with retrospective effect are non-derogable rights (Article 28I(1) Constitution of Indonesia). Although Cambodia's Constitution limits rights to Khmer citizens, this limitation does not apply to the provisions that deal with the right to life. This could imply that the right to life is considered by Cambodia as a *ius cogens* norm. Myanmar's position the prohibition of forced labour differs from the general stance that these norms are *ius cogens* norms, as Myanmar formulates restrictions to the prohibition of forced labour. Furthermore, Myanmar's Constitution does not mention the prohibition of torture. From the analysis of the core UN human rights documents (Section 2 of Chapter III) follows that Thailand acknowledged that Articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18 of the ICCPR are non-derogable rights.

In addition, not all rights that are generally considered to be non-derogable rights are included in each constitution. For example, the prohibition of slavery is not included in the constitutions of Brunei Darussalam, Laos and Vietnam. The freedom from torture is only included in the constitutions of Cambodia, Indonesia, the Philippines, Thailand and Vietnam, whereas the right to be presumed innocent is included in the constitutions of Cambodia, the Philippines, Thailand and Vietnam.

With respect to *ius cogens*, it could be concluded that the ASEAN Human Rights Declaration detracts in several ways from the universality of human rights at the level of concepts. In addition, the aforementioned examples of the omission of human rights standards that are considered to be *ius cogens* norms in the constitutions of the Member States, make clear that also individual Member States distance themselves from the universality of human rights at the level of concepts.

AHRD's standards in relation to the standards set by the UN and the ASEAN Member States

The ASEAN Human Rights Declaration is characterised as a document that moved beyond the Member State's constitutions. The inclusion of civil and political rights in the AHRD especially overtakes those recognised by the majority of the Member States. The AHRD moves beyond the constitutions by not restricting the rights to ASEAN citizens (except for the right to vote). This does not necessarily mean that it builds upon the universality of human rights. Instead, the conclusion can be drawn that the ASEAN Human Rights Declaration undermines the claim to the universality of human rights in terms of concepts on the following fronts.

First of all, the ASEAN Human Rights Declaration fails to include a number of human rights that can be found in core UN human rights documents and/or are included in the constitutions of a number of the ASEAN Member States. From Section 4 of Chapter V follows that the Declaration omits elements of rights, while they are included in the UDHR. From the aforementioned (non-exhaustive) list of *ius cogens* follows that a number of these rights are considered to be non-derogable rights.

Specifically, the ASEAN Human Rights Declaration does not include the following rights or prohibitions (of which some are discussed in more detail later on): the prohibition of the death penalty, the prohibition of enforced disappearances, the freedom from forced labour, the principle of *non-refoulement* and the freedom of association. In addition, the freedom to manifest and change one's of religion is replaced with the prohibition of intolerance, discrimination and incitement of hatred. The right to found a family lacks the prohibition of discrimination. Equality in and a just and favourable remuneration for work, the right to rest and leisure, and the right to a social and international order in which the rights of the Declaration can be fully realised are also not mentioned in the ASEAN Human Rights Declaration. Social security is also not included when stipulating the right to an adequate living standard. Finally, the right to self-determination and the rights of indigenous peoples are missing altogether.

The drafts of the ASEAN Human Rights Declaration from January and June 2012 are included in the present study. When comparing these drafts with the final version of November 2012, topics on which the Member States had to compromise, become visible. The drafts are at times broader than the final version. Specifically, the right to pursue one's own economic and social development and to choose its own political system, the right to a fiscally responsive government and/or system were included in the drafts.

From Donnelly's observation that at least Articles 3-12 UDHR are universally held concepts, it follows that the omission of these rights, such as the freedom from forced labour and the freedom of religion, detracts from the claim to the universality of human rights at the level of concepts. Moreover, the rights that are omitted in the ASEAN Human Rights Declaration are included in the core UN human rights instruments, to which the ASEAN Member States are partially a State

Party (see Section 2 of Chapter III), and in a number of the constitutions of the Member States (see section 3 of Chapter III). Specifically, by omitting these rights, the AHRD is downplaying the standards set at UN level and in the individual Member States. Moreover, by excluding internationally recognised human rights standards, ASEAN does not live up to its own commitments that the organisation has formulated. Specifically, it contradicts ASEAN's own commitment to the UDHR, the UN Charter, the Vienna Declaration and Programme of Action and other international human rights instruments to which the Member States are parties although it is unclear whether these human rights instruments have to be endorsed by all ASEAN Member States in order to become relevant at ASEAN level.

The omission of the aforementioned rights and prohibitions could possibly be explained by a lack of consensus on these issues among the ASEAN Member States or, instead, an overlap in downplaying certain human rights standards. Regarding the right to self-determination, for instance, four of the six ASEAN Member States that ratified the ICCPR (Indonesia, Laos, Thailand and Vietnam) made a declaration. Three of these States formulated a declaration with respect to the right to self-determination. Indonesia, Myanmar and Thailand also made a declaration on this right as included in the ICESCR. Related to the right to self-determination, the AHRD also fails to include minority groups or indigenous peoples in its final version. Although the January draft made clear that Laos and Myanmar made reservations to the inclusion of minority groups and indigenous people as vulnerable people, the general position of the governments of the other ASEAN Member States could also explain this omission.

The prohibition of forced labour was initially mentioned in the draft of the ASEAN Human Rights Declaration, but was not included in the final version. Muntarbhorn noted that the prohibition of forced labour was ultimately omitted because the AICHR representatives considered forced labour equivalent to servitude, which is included in Article 13 AHRD. He rightly argued that forced labour is a wider concept than that which is formulated in Articles 13 and 27 AHRD (on free choice of employment and working conditions).

The prohibition of enforced disappearance is not clearly included in the AHRD. Salient is that the working draft of January 2012 included this topic in relation to the right to personal liberty, whereby reference was made in a footnote to the International Convention for the Protection of all Persons from Enforced Disappearance. Only Cambodia acceded to this Convention, whereas three other ASEAN Member States signed this Convention. From the comparative analysis of the constitutions of the ASEAN Member States it also follows that the prohibition of slavery and forced labour is not included in the constitutions of Brunei Darussalam and Laos.

Whereas Article 24 AHRD includes the right to freedom of peaceful assembly, the general right to the freedom of association is omitted. Only Laos made a reservation on Article 22 ICCPR by subjecting this article to national law and the right is enshrined in all constitutions except for the constitution of Brunei

Darussalam. Striking is that this omission in the AHRD does not correspond to the general formal endorsement in the constitutions of the individual Member States.

The freedom to manifest and change one's religion is problematic, as Section 2 of Chapter III has illustrated. A number of Islamic ASEAN Member States made reservations to provisions of UN Conventions that may be contrary to its constitution and beliefs and principles of Islam (see section 2 of Chapter III). More specifically, the freedom of thought, conscience and religion is also subjected to constitutions, national laws and practices.

According to Donnelly, the right to change one's religion could either be placed under the heading of universality in terms of concepts or conceptions; ultimately he argued for the latter. He has indicated that he is inclined to regard the prohibition of apostasy by Muslims as probably compatible with the relative universality of human rights, although he acknowledged at the same time that his argument accepts too great a relativism.⁶ This latter viewpoint is visible in literature. Jaclyn L. Neo argued, for instance, that the freedom to have or to adopt a religion "necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief".⁷

Based on the aforementioned, one could argue that at the level of concepts, the right to change one's religion is inherent to the freedom of religion. Consequently, the ASEAN Human Rights Declaration fails to live up to the international standard of the freedom of religion at the level of concepts.

The ASEAN Human Rights Declaration also lowers for instance the standard of the ICESR, which provides developing countries the discretion within the context of the 'progressive realisation' to determine to what extent they guarantee economic and social rights to non-nationals. In contrast, all ASEAN Member States are provided this choice according to Article 34 AHRD. While this a reflection of the constitutions of the Member States, which are often restricted to their citizens, and the principle of State sovereignty, this discretion has been criticised in the present study for having a direct impact on the universality, indivisibility, interdependence, and correlativity of human rights.

As to the right to property and the prohibition of arbitrary deprivation of property (Article 17 AHRD), it is rightfully observed that this is not included in the ICCPR and ICESR.⁸ It is also observed that this article is "perhaps one of the

⁶ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281, pp. 301-303.

⁷ Jaclyn L. Neo, 'Religious Freedom and the ASEAN Human Rights Declaration: Prospects and Challenges' (2016) 14 (4) *The Review of Faith & International Affairs* 1, p. 3 and UN Human Rights Committee, General Comment 22 on 'The Right to Freedom of Thought, Conscience and Religion (Article 18)' of 30 July 1993, UN Doc. CCPR/C/21/Rev.1/Add.4. She furthermore addresses difficulties of the freedom of religion in other ASEAN Member States in this article.

⁸ American Bar Association, *The ASEAN Human Rights Declaration: A Legal Analysis* (American Bar Association Rule of Law Initiative 2014), p. 46 <<https://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>> last

clearest and most comprehensive statements of the right to property in a regional human rights instrument”.⁹ Upon accession to or ratification of UN human rights treaties, no declarations or reservations are made to the right to property as included in the CRPD, ICERD and CMW. The analysis of the constitutions illustrates that the majority of the ASEAN Member States have included the right to property in their constitutions.

Respecting the right to development and the right to peace are often described as ASEAN characteristics. The right to development is included in Articles 35-37 AHRD, which cannot be found in the binding core human rights documents of the UN as discussed in section 2 of Chapter III. The right to a safe, clean and sustainable environment, the rights to live free from poverty and hunger and the right to peace are also included. The AHRD also continues ASEAN’s focus on women and children. This focus on vulnerable groups is generally considered as typical for ASEAN, although these topics are also taken up at UN level. While the AHRD expands the UDHR by including the trafficking in human organs in the prohibition of smuggling or trafficking in persons, this is not a distinctive feature of the AHRD. The provision on the family as the natural and fundamental unit of society and the right to marry and dissolve a marriage reflects a more institutional and communitarian conception of the relationship between individuals and family. In conclusion, it can be observed that the added value of the AHRD in terms of contributing to the human rights framework in terms of concepts is visible in several ways, although overall limited. As far as the objections to the claim to the universality of human rights at the level of concepts – the mirror image of the ‘added value’ – are concerned, the omissions mentioned above are able to serve as examples of non-permitted deviations.

2.2 Universality in terms of conceptions

As elaborated in Chapter II, the universality of human rights is presumed in international human rights law. The implications of this universality have, however, been debated throughout the years in the discussions on universalism and (cultural) relativism. These viewpoints seemed to be irreconcilable at first, whereby Donnelly concluded that strong universalism and strong cultural relativism are extreme forms and untenable. On the other hand, more moderate views are viable. As Donnelly initially considered that they merge into each other on a two-dimensional sliding scale, he now instead aptly pictures a multiple space as the universality of human rights is relative to various factors.

accessed 16 September 2018. Specific human rights documents include the right to property, such CEDAW, ICERD and ICRMW.

⁹American Bar Association, *The ASEAN Human Rights Declaration: A Legal Analysis* (American Bar Association Rule of Law Initiative 2014), p. 45 <<https://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf>> last accessed 16 September 2018.

When applying this to the debate on the universality of human rights in the ASEAN region, one could conclude the following. The discussion on the universality of human rights and the possibility to incorporate national and regional particularities in the interpretation of human rights initially revolved around relativistic attitudes that were brought by some States as Asian values. By focusing too much on these Asian particularities, a form of strong relativism was upheld. As concluded in Chapter II, an extreme form of strong relativism (just like an extreme form of universalism) is invalid. Section 2 of Chapter V showed that this strong form of relativism was used as a political argument, whereby there is a risk that it is used as an excuse for not (or at least not yet) complying with universal human rights.

However, one cannot deny that human rights are interpreted in their context. This could be considered as a moderate form of relativism and is also visible in other regional human rights systems. The margin of appreciation of the Council of Europe is in this respect a clear example. In ASEAN context, it might be better to speak of ‘Values in Asia’ that could be considered, as Muntarbhorn suggested. What these values exactly entail remains, however, difficult to ascertain as reference is often made to particularities in general instead of explaining which values are dominant in the ASEAN region. In addition, the question of ‘who is making the argument?’ remains, as some governmental viewpoints on human rights are not shared by civil society organisations. Medina’s answer when discussing the existence of a Southeast Asian context or ASEAN context in the field of human rights illustrates the validity of this question: “If you ask me as an advocate, I will say no. But if you... If I wear the shoes of government I will say yes. Because, their thinking is there are certain values, which are peculiar to ASEAN, which are not as strong [as] in other countries.”¹⁰

Nevertheless, contextualisation of human rights can be considered as a moderate form of relativism, while the universality of human rights still remains the starting point. This implies that the focus on national and regional particularities in the ASEAN region does not have to be detrimental to the universality of human rights, as long as international human rights standards as formulated at UN level are upheld. Indeed, all regional human rights systems leave room for, and underscore the importance of, considering national and regional particularities.

Scepticism towards relativistic attitudes of ASEAN Member States is thus unfounded when these ideas are plausible and defensible, hereby constituting a moderate form of relativism and taking the universality of human rights as a starting point. The increasing number of ratifications of core UN human rights documents also indicates that a strong form of relativism is not dominant in the region. In addition, although Mahbubani tried to spark up strong cultural relativism in 2008¹¹

¹⁰ Interview with Carlos Medina, Director of the Ateneo Law Faculty’s Human Rights Center at Ateneo de Manila University (Manila, 20 November 2009).

¹¹ During the promotion of Kishore Mahbubani, *The New Asian Hemisphere: The Irresistible Shift from Global Power to the East* (PublicAffairs, New York 2008).

it seems that it did not obtain a strong foothold in the region, as initiatives have been taken for a regional human rights system in which reference is made to international human rights standards.

When looking at the nuances in the interpretation of rights, the choice has been made to analyse the ASEAN Human Rights Declaration and the reservation and declarations made to the core human rights instruments of the United Nations. It could be concluded that the limitations that are formulated by the ASEAN Member States overall detract from the universality of human rights at the level of conceptions.

ASEAN Member States have to uphold human rights, which are generally considered to be *ius cogens* norms because of their status in international law. In this regard, the general principle formulated in Article 8 AHRD, which deals with the limitations to human rights is contrary to international law. The ASEAN Human Rights Declaration includes human rights, which are considered to be *ius cogens* norms based on customary law. As Article 8 AHRD is formulated as one of the general principles, the limitations listed in this article are applicable to all rights and freedoms as formulated in the ASEAN Human Rights Declaration, thus including the rights and freedoms which are internationally recognised as *ius cogens* norms.

It is often argued that in ASEAN Member States (but also in other parts of the world) the focus lies on duties. This is connected to the general assumption that Asian societies are communitarian and consensual. These elements would bring about a difference in the interpretation of human rights. Donnelly contended that this description explains less than proponents of cultural relativism argue. Bearing this in mind, the following can be said with respect to the level of conceptions.

The stress on duties alongside rights is typical for the ASEAN region and other mainly non-Western States, albeit this distinction should – in light of the above – not be overstressed. In this respect, all rights except for *ius cogens* norms are balanced within a context and rights of others. This implies duties alongside rights, also in Western States. Different is, however, the explicit reference to certain duties which must be balanced with rights and freedoms, as well as the generality of these duties that can in practice lead to limiting one's human rights. Both the constitutions of the ASEAN Member States (see Chapter II, section 3 for more details) and the AHRD list a number of duties.

The AHRD includes duties as one of its general principles (Article 6 AHRD). Consequently, all human rights as enshrined in the Declaration are subjected to these general duties, which could potentially lead to unreasonable restrictions and a departure from the universality of human rights in terms of conceptions.

Furthermore, Article 7 AHRD states that “the realisation of human rights must be considered in the regional and national context, bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds”. Although the contextualisation of human rights is typical for ASEAN, the formulation of this provision is reminiscent of the Asian values debate and relativistic attitudes, which were detrimental to human rights.

The implications of Article 7 AHRD are vague and open up the risk for interpreting human rights in such a way that international human rights standards are lowered. In this respect, it is argued that this provision differs from Article 5 of the Vienna Declaration. In particular, whereas Article 5 UDHR underscores the importance of the universality of human rights, Article 7 AHRD makes particularism a condition for the realisation of human rights.

A number of rights enshrined in the ASEAN Human Rights Declaration are subjected to national law. This corresponds to the general practice with respect to the core UN human rights conventions. Specifically, Section 2 of Chapter III showed that a high number of ASEAN Member States have subjected certain provisions of the international human rights conventions to national constitutions, legislation, regulations and local customs, values and religions. The principles of sovereignty and territorial integrity of States were also stressed. Following customary law and as codified in Article 19(c) Vienna Convention on the Law of the Treaties, reservations incompatible with the object and purpose of a treaty are not permitted. Accordingly, a general principle is that a party cannot invoke provisions of national law as a justification for its failure to comply with its obligations under a treaty (see also Article 27 Vienna Convention on the Law of the Treaties).

In line with this, ASEAN cannot subject all the provisions of the ASEAN Human Rights Declaration to national law in a general article that applies to all human rights that are formulated in the AHRD. Also, the extent of commitment is unclear when specification is lacking, raising doubts with respect to commitment and could undermine the basis of these provisions. In addition, the conclusion that human rights are restricted in such a way that it detracts from the universality of human rights at the level of conceptions, also has implications for the level of concepts as these human rights standards are undermined.

The AHRD's limitation clause (Article 8 AHRD) is discussed in the previous section at the level of concepts. At the level of conceptions, this provision is also relevant as it subjects all rights and freedoms to these limitations. This could lead to limitations which do not pass the test of legality, legitimacy and proportionality.

Article 40 AHRD constitutes a general limitation clause. Although reference is made to international human rights instruments, there is a risk that this article undermines the human rights that are formulated in the ASEAN Human Rights Declaration due to its reference to the purpose and principles of ASEAN. This includes the ASEAN Way, which is overall detrimental to ASEAN's human rights cooperation.

The previous section scrutinised the freedom of thought, conscience and religion, which a number of Islamic ASEAN Member States subjected to their constitutions, national laws and practices. As the example of Lina Joy illustrated, this means in practice that the freedom of religion does not include the right to change one's religion. According to Donnelly, this interpretation of the freedom of religion could either be placed at the level of concepts or conceptions. While there

is a difference in nuance, this example shows that these levels are closely connected to each other. Placing the right to apostasy at the level of concepts ensures that every denial of such a right contradicts the universality of human rights.

Placing this right at the level of conceptions, as Donnelly does, brings about a slightly different line of reasoning, but has the same outcome, namely, that the universality of human rights is not upheld. The freedom of thought, conscience and religion is formally endorsed in the constitutions of all ASEAN Member States. All Members seem to subscribe to this right, although the interpretative declarations and reservations show that this right is interpreted by a number of Member States in such a way that the freedom of religion does not mean that one is allowed to change one's religion. At this level, there is room for weighing whether the particularity of the prohibition of apostasy is an interpretation that falls within the scope of the freedom of religion. While Donnelly was inclined to say yes, the general tendency is to argue that this interpretation limits the freedom of religion in such a way, that it contradicts the object and purpose of this article. Hence, interpreting the freedom of thought, conscience and religion in a way in which the particularity of the prohibition of apostasy is included, contradicts the universality of human rights at the level of conceptions. Furthermore, this universality is impeded because the ASEAN Human Rights Declaration only addresses the internal aspect; actual practising this freedom is omitted.

In summary, while ASEAN refers to the UDHR and UN conventions to which the ASEAN Member States are party, ASEAN and its Member States detract from the universality at the level of conceptions.

2.3. Universality in terms of implementation

Although variation in implementation does not necessarily affect the universality of human rights at the level of concepts or conceptions, ASEAN's mechanisms lead in several ways to a denial of the right to invoke one's human rights and, consequently, to a detraction of the universality of human rights. The 'defective implementation mechanisms' are visible in two ways. Firstly, certain human rights provisions that are formulated in the AHRD lack procedural aspects that are included in human rights instruments at UN level. A clear example is Article 12 AHRD, which lacks procedural protections against arbitrary arrest or detention that are included in Article 9(2-5) ICCPR. Without these protections, there is a risk for unlawful or arbitrary arrests or detention.

Secondly, the mechanisms that are established to promote and protect the human rights enshrined in ASEAN's human rights instruments have a restricted mandate. This study examined the ASEAN Intergovernmental Commission on Human Rights, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. The focus hereby lies on the ASEAN Intergovernmental Commission on

Human Rights because it is ASEAN's overarching human rights body, and the commonalities in mandate with the other two mechanisms.

This study shows that the ASEAN Intergovernmental Commission on Human Rights lacks of independence, has a weak mandate in terms of protection, has no dispute settlement mechanism and does not cater for an individual complaint procedure, nor is a judicial mechanism installed to hear cases and deliver binding judgments. This caused the critique on ASEAN for 'lacking teeth', whereby from ASEAN's side it was argued that 'no biting is required'.

This research shows that following the ASEAN Way affects the mandate of the ASEAN Intergovernmental Commission on Human Rights and the way this mandate is exercised. Specifically, the Commissioners take into account the notions of non-interference and the respect for the sovereignty of the Member States. Also, the notions of consultation and consensus determine the cooperation between the Commissioners and the possibilities for human rights promotion and protection. Regarding the last two principles, it is likely that this approach hampers developing a higher level of human right protection.

The Commissioners officially meet twice per year and do not make much of their work public. This contrasts Article 6.7 of the ToR, which stipulates that "[t]he AICHR shall keep the public periodically informed about its work and activities and through appropriate public information materials produced by the AICHR". It also makes it impossible for civil society and the National Human Rights Institutions to serve as a system of checks and balances on the AICHR. The latter, however, would be in line with ASEAN's own ambition "[t]o promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building" (Article 13 ASEAN Charter). In addition, these factors and actors could mitigate the lack of independence of the Commissioners.

The limited mandate of the AICHR is clearly visible in the 'score card' as developed by Forum-Asia. The indicators used in this score board are adapted from the 1993 UN Principles Relating to the Status of National (Human Rights) Institutions (the Paris Principles), and a Non-Paper, "Principles for Regional Human Rights Mechanisms" developed by the Office of the High Commissioner for Human Rights (OHCHR). The score card is divided in the topics of mandate and power, independence and plurality, and transparency/accountability. The AICHR only scored positive on the following seven points: (1) power to make recommendations and proposals to Member States, (2) power to request information from Member States, (3) power to report on general human rights themes, (4) advisory function to Member States, (5) public information/education function, (6) ensure a balance of nationalities within commission, and (7) commission members have diplomatic immunities and privileges.¹²

¹² Human Rights in ASEAN-Online Platform, ASEAN Intergovernmental Commission on Human Rights, Score Card, <<http://humanrightsinasean.info/asean-intergovernmental-commission-human-rights/score-card.html>> last accessed 18 September 2018.

In addition, while AICHR cannot receive individual complaints, the establishment of a human rights court in the ASEAN region is not foreseen. Morada correctly observed that “ASEAN can only rely on national legislatures and courts within member states to implement or comply with norms, agreements, or action plans at the domestic level”.¹³

Finally, the National Human Rights Institutions established in Malaysia, Indonesia and the Philippines and researched in this study, can at least on paper contribute to the universality of human rights at the level of implementation because their mandate is overall broader than the mandate of the AICHR. Only time will tell in what way they will actually use these competences, and furthermore, to what extent they will be able to have an impact upon the ASEAN Member States’ action in the field of the implementation of human rights.

¹³ Noel L. Morada, ‘Southeast Asian Regionalism, Norm Promotion and Capacity Building for Human Protection: An Overview’ (2016) 8 *Global Responsibility to Protect* 111.

ANNEXES

ANNEXES

Annex 1. Ratifications of UN human rights documents¹ by the ASEAN Member States

Member States/ HR doc	Brunei Darussalam	Cambodia ²	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
ICERD S: 0 R/A: 7	-	S1966 R1983	A1999 D	A1974	-	-	S1966 R1967	S2015 R2017 D	A2003 D	A1982 D
ICCPR S: 0 R/A: 6	-	S1980 A1992	A2006 D	S2000 R2009 D	-	-	S1966 R1986 D	-	A1996 D	A1982 D
ICCPR OPT S: 1 R/A: 1	-	S2004	-	-	-	-	S1966 R1989	-	-	-

¹ The human rights documents are abbreviated. The list includes the following: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1969), International Covenant on Civil and Political Rights (ICCPR, 1976), Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR, OPT, 1976), Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR, OPT 2, 1991), International Covenant on Economic, Social and Cultural Rights (ICESCR, 1976), Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR, OPT, 2013), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1981), Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, OPT, 2000), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1987), Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, OPT, 2006), Convention on the Rights of the Child (CRC, 1990), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC, OPT Armed conflict, 2002), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC, OPT sale of children, 2002), Optional Protocol to the Convention on the Rights of the Child on a communications procedure (CRC, OPT Communications Procedure, 2014), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW, 2003), International Convention for the Protection of all Persons from Enforced Disappearance (CED, 2010), Convention on the Rights of Persons with Disabilities (CRPD, 2008), Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD, OPT, 2008).

² Although Democratic Kampuchea had signed the ICCPR, ICESCR and CEDAW, the Government of Cambodia deposited an instrument of accession to these Covenants.

ICCPR OPT 2 S: 0 R/A: 1	-	-	-	-	-	-	S2006 R2007	-	-	-
ICESCR S: 0 R/A: 7	-	S1980 A1992	A2006 D	S2000 R2007	-	S2015 R2017 D	S1966 R1974	-	A1999 D	A1982 D
ICESCR OPT S: 0 R/A: 0	-	-	-	-	-	-	-	-	-	-
CEDAW S: 0 R/A: 10	A2006 D	S1980 A1992	S1980 R1984 D	S1980 R1981	A1995 D	A1997 D	S1980 R1981	A1995 D	A1985 D	S1980 R1982 D
CEDAW OP S: 1 R/A: 3	-	S2001 R2010	S2000	-	-	-	S2000 R2003	-	S2000 R2000	-
CAT S: 1 R/A: 6	S2015 D	A1992	S1985 R1998 D	S2010 R2012 D	-	-	A1986	-	A2007 D	S2013 R2015 D
CAT OP S: 0 R/A: 2	-	S2005 R2007	-	-	-	-	A2012 D	-	-	-
CRC S: 0 R/A: 10	A1995 D	A1992	S1990 R1990	A1991	A1995 D	A1991	S1990 R1990	A1995 D	A1992 D	S1990 R1990
CRC OP AC S: 1 R/A: 9	A2016 D	S2000 R2004 D	S2001 R2012 D	A2006 D	A2012 D	S2015	S2000 R2003 D	S2000 R2008 D	A2006 D	S2000 R2001 D
CRC OP CS S: 0 R/A: 9	A2006	S2000 R 2002	S2001 R2012	A2006 D	A2012 D	A2012	S2000 R2002	-	A2006	S2000 R2001
CRC OP CP S: 0 R/A: 1	-	-	-	-	-	-	-	-	S2012 R2012	-
CMW S: 1 R/A: 2	-	S2004	S2004 R2012	-	-	-	S1993 R1995	-	-	-
CED S: 3 R/A: 1	-	A2013	S2010	S2008	-	-	-	-	S2012	-
CRPD S: 0 R/A: 10	S2007 R2016 D	S2007 R2012	S2007 R2011	S2008 R2009	S2008 R2010 D	A2011	S2007 R2008	S2012 R2013 D	S2007 R2008	S2007 R2015
CRPD OPT S: 1 R/A: 1	-	S2007	-	-	-	-	-	-	A2016	-
Signed Party Declaration/ Reservation	1 5 5	3 12 1	2 10 6	1 9 4	0 5 5	1 5 2	0 14 3	0 5 5	1 12 7	0 9 6

In this scheme, 'S' means signed, 'R' means ratified, 'A' acceded to, whereas '-' means that the treaty is neither signed nor ratified or acceded to. 'D' indicates that (interpretative) declarations and/or reservations are made. The numbers mentioned after S, R and A are the years in which the State signed, ratified or acceded to the convention. The number of States

which only signed and which are party to the convention is included per convention. This scheme also shows the total number of conventions that are signed per State and to which the State is party. Also included are the number of conventions to which the State formulated declarations and reservations.

Annex 2. Common ground in the Constitutions of the ASEAN Member States

Member States/HR (article in the UDHR in brackets):	Brunei Darussalam	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Equality, non-discrimination (1, 2, 7, 23 (2))	-	x	x	x	x	x	x	x	x	x
Life (3)	-	x	x	-	x	x	x	x	x	x
Liberty (3)	-	x	-	-	x	x	x	x	x	x
Security (3)	-	x	x	x	-	-	x	-	x	x
Slavery, forced labour (4)	-	x	x	-	x	x	x	x	x	x
Torture, cruel, inhuman, degrading treatment/ punishment (5)	-	x	x	-	-	-	x	-	x	x
Recognition as a person before the law (6)	-	-	x	-	-	-	x	-	-	-
Effective remedy (8)	-	x	-	-	-	x	x	-	x	x
Arbitrary arrest, detention, exile (9)	-	x	-	x	x	x	x	x	x	x
Fair, independent impartial trial (10)	-	x	x	-	-	x	x	x	-	x
Presumed innocent (11 (1))	-	x	-	-	-	-	x	-	x	x
Defence (11 (1))	-	x	-	-	-	-	x	-	-	x
Retrospective law (11 (2))	-	-	x	-	x	x	x	x	x	-
Privacy (12)	-	x	-	x	-	x	x	-	x	x
Honour, reputation (12)	-	x	x	x	-	-	-	-	x	x
Movement (13 (1))	-	x	x	x	x	x	x	x	x	x
Leave and entry (13 (2))	-	x	x	-	-	-	-	-	x	x

Member States/HR (article in the UDHR in brackets):	Brunei Darussalam	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Asylum (14)	-	-	x	x	-	x	-	-	-	x
Nationality (15)	-	-	x	-	-	-	-	-	-	x
Marriage, family (16)	-	x	x	-	-	-	x	-	x	x
Property (17)	-	x	x	x	x	x	x	-	x	x
Thought, conscience, religion (18)	x	x	x	x	x	x	x	x	x	x
Expression (19)	-	x	x	x	x	x	x	x	x	x
Information, media (19)	-	x	x	-	-	-	x	-	x	x
Assembly, association (20)	-	x	x	x	x	x	x	x	x	x
Vote/to be elected, access to public service (21)	-	x	x	x	x	x	x	-	x	x
Social security (22)	-	x	x	x	-	x	x	-	x	x
Work (23 (1))	-	x	x	x	-	x	x	-	x	x
Just, favourable remuneration (23 (3))	-	x	x	-	-	-	x	-	-	-
Trade unions (23 (4))	-	x	-	-	-	-	x	-	x	-
Rest, leisure (24)	-	-	-	x	-	-	-	-	-	-
Adequate living standard (25 (1))	-	-	x	-	-	-	x	-	-	-
Women, children (25 (2))	-	x	x	-	-	-	x	-	x	x
Education (26)	-	x	x	x	-	x	x	-	x	x
Cultural life, arts, science (27 (1))	-	x	x	x	-	x	x	-	x	x
Intellectual property (27 (2))	-	-	-	-	-	x	x	-	-	x
Duties (29 (1))	-	x	x	x	-	x	x	-	x	x

Member States/HR (article in the UDHR in brackets):	Brunei Darussalam	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Limitations human rights (29 (2))	-	x	x	-	-	-	-	-	x	x
Affecting others (30)	-	x	x	-	-	-	-	-	x	x
Aged, disabled	-	x	x	x	-	x	x	-	x	x
Citizenship	-	-	-	-	x	x	x	x	-	-
Clean environment, sustainable development	-	x	x	-	-	x	x	-	x	x
Donation tissues/organs	-	-	-	-	-	-	-	-	-	x
Health(care)	-	-	-	x	-	x	x	-	x	x
Imprisonment with respect to tax	-	-	-	-	-	-	x	-	-	-
Minorities/indigenous peoples	-	-	x	x	x	-	x	x	-	x
Obligation of contracts	-	-	-	-	-	-	x	-	-	-
Petition to government	-	x	-	x	-	x	x	-	x	x
Self-improvement	-	-	x	-	-	-	-	-	-	-

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